(1)

No. 93-5161-CSY
Status: GRANTED
CAPITAL CASE

Title: William Arnold Proctor, Petitioner
v.
California

Docketed:
July 8, 1993

Court: Supreme Court of California

Counsel for petitioner: Lascher,Wendy C.

See also:
92-8482
93-5019
93-5131
93-5140

Counsel for respondent: Lungren,Daniel E.

Entry	Date	Note	Proceedings and Orders
1	May 27 1993	G	Application (A92-894) to extend the time to file a petition for a writ of certiorari from June 8, 1993 to July 8, 1993, submitted to Justice O'Connor.
2	May 28 1993		Application (A92-894) granted by Justice O'Connor extending the time to file until July 8, 1993.
3	Jul 8 1993	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
5	Aug 19 1993		Brief of respondent California in opposition filed.
6	Aug 26 1993		DISTRIBUTED. September 27, 1993
7	Sep 16 1993		Record requested -- DHS.
9	Oct 18 1993		Record filed.
		*	Proceedings from Supreme Court of California and Superior Courts of Shasta and Sacramento Countys(2bxs;+1sealed)
10	Nov 10 1993		REDISTRIBUTED. November 24, 1993 (Page 28)
11	Nov 18 1993		REDISTRIBUTED. November 24, 1993 (Page 28)
13	Nov 29 1993		REDISTRIBUTED. December 3, 1993 (Page 16)
15	Dec 6 1993		Petition GRANTED. The case is consolidated with No. 93-5131, Tuilaepa v. California, and a total of ninety minutes is allotted for oral argument.
			**********
16	Dec 20 1993	G	Motion of petitioner for appointment of counsel filed.
17	Dec 29 1993		REDISTRIBUTED. January 7, 1994. (Page 42)
18	Jan 10 1994		Motion for appointment of counsel GRANTED and it is ordered that Wendy C. Lascher, Esq., of Ventura, California, is appointed to serve as counsel for the petitioner in this case.
20	Jan 24 1994		Brief amicus curiae of California Appellate Project filed. VIDED.
19	Jan 26 1994		Joint appendix filed.
22	Jan 27 1994		Brief of petitioner William Proctor filed.
21	Feb 2 1994		SET FOR ARGUMENT TUESDAY, MARCH 22, 1994. (3RD CASE).
23	Feb 14 1994		Application (A-680) to file consolidated brief on the merits in excess of page limits, submitted to Justice O'Connor.
24	Feb 15 1994		Application (A-680) granted by Justice O'Connor. Brief may not exceed 75 pages.
25	Feb 15 1994		CIRCULATED.
26	Feb 22 1994	X	Brief amicus curiae of Criminal Justice Legal Foundation filed. VIDED.

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No. 93-5161-CSY

Entry	Date	Note	Proceedings and Orders
27	Feb 25 1994	X	Brief of respondent California filed. VIDED.
28	Mar 22 1994		ARGUED.

93-5161

No. _____

Supreme Court, U.S.
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

October Term, 1993

ORIGINAL

WILLIAM ARNOLD PROCTOR,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

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ORIGINAL
35 pp

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PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Petitioner, WILLIAM ARNOLD PROCTOR, requests leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed in forma pauperis. Petitioner has been granted leave to do so before the California Supreme Court and has proceeded in the California trial court and the California Supreme Court with the assistance of court-appointed counsel. Petitioner's affidavit in support of this motion is attached hereto.

DATED: July 7, 1993

Wendy C. Lascher
WENDY C. LASCHER,
Attorney for Petitioner

No. _____

In The

Supreme Court of the United States

October Term, 1993

WILLIAM ARNOLD PROCTOR,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION
TO PROCEED IN FORMA PAUPERIS

I, William Arnold Proctor, being first sworn, depose and say that I am the petitioner in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor, and that I believe I am entitled to redress.

I further swear that the responses which I have made to the question and instructions below relating to my ability to pay the cost of proceeding in this Court are true:

1. Are you presently employed? Yes _____ No ✓

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

b. If the answer is no, state the date of you last employment and the amount of the salary and wages per month which you received.

March of 1982, on the job training, truck driving school, ~~[illegible]~~ minimum wage

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? Yes _____ No ✓

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve past months.

3. Do you own any cash or checking or savings account (include any funds in prison accounts)? Yes _____ No ✓

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes _____ No ✓

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

none

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 6-15-93.

Wm Proctor
WILLIAM ARNOLD PROCTOR

CERTIFICATE

I hereby certify that the petitioner WILLIAM ARNOLD PROCTOR has the sum of $ 0 on account to his credit at California State Prison at San Quentin where he is confined. I further certify that petitioner likewise has the following securities to his credit according to the records of said institution:

NONE

Dated: 6/21/93

C K Holmstrom, CCII
Authorized Officer of
California State Prison at
San Quentin

CERTIFICATE OF SERVICE

I, Wendy C. Lascher, a member of the Bar of this Court, hereby certify that on this 8th day of July, 1993, copies of the MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS in the above-entitled case were mailed, first class postage pre-paid, as follows:

Office of the Attorney General
State of California
1515 "K" Street
Suite 511
Sacramento, California 95814

District Attorney
Shasta County
1525 Court Street
P.O. Box 1320
Redding, California 96001

I further certify that all parties required to be served have been served.

Dated: July 8, 1993

Respectfully submitted,

LASCHER & LASCHER,
A Professional Corporation
WENDY C. LASCHER*,

By: Wendy C Lascher
Attorneys for Petitioner
William Proctor

*Counsel of Record

No. _____

In The

Supreme Court of the United States

October Term, 1993

WILLIAM ARNOLD PROCTOR,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition For Writ Of Certiorari
To The Supreme Court Of The State Of California

PETITION FOR WRIT OF CERTIORARI

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No. _____

In The

Supreme Court of the United States

October Term, 1993

WILLIAM ARNOLD PROCTOR,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition For Writ Of Certiorari
To The Supreme Court Of The State Of California

Petitioner William Arnold Proctor respectfully prays that a writ of certiorari issue to review the judgment and opinion of the California Supreme Court entered in the above-entitled proceeding on December 28, 1992.

QUESTIONS PRESENTED

This case, arising from petitioner's California murder conviction, presents the following questions:

Does California's capital sentencing scheme violate the Eighth Amendment requirement that judges' and jurors' discretion be limited and channeled:

(a) By failing to specify whether particular penalty phase factors are to be treated as aggravating or mitigating circumstances;

(b) By allowing absence of mitigating evidence to be treated as an aggravating circumstance; and

(c) By permitting a judge and jury which did not determine guilt phase issues to consider undefined "circumstances of the crime" as an aggravating factor?

OPINION AND ORDER BELOW

The opinion of the California Supreme Court, which is published at 4 Cal.4th 499 (1992), is reprinted in the Appendix to this petition [App. A].[1/] The order denying petitioner's petition for rehearing, filed March 10, 1993, is reproduced at App. B.

JURISDICTION

The opinion of the California Supreme Court was filed December 28, 1992 [App. A, p. 1]. Petitioner filed a timely petition for rehearing, which the court denied on March 10, 1993 [App. B].

On May 28, 1993, Justice O'Connor granted an extension of time to file this writ petition until July 8, 1993. A copy of that order is reproduced at App. C. Accordingly, this petition is timely under Rule 13 of the United States Supreme Court Rules.

1/ The opinion is cited as App. A, followed by a specific page number for that document. The order denying rehearing is App. B. The order extending time to file this petition is App. C.

This Court's jurisdiction to grant certiorari is invoked under 28 U.S.C. §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law . . ."

The Eighth Amendment to the United States Constitution provides:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of Citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

California Penal Code §190.3 provides, in pertinent part:

> "In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:
>
> "(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.
>
> "(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

> "(c) The presence or absence of any prior felony conviction.
>
> "(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> "(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.
>
> "(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.
>
> "(g) Whether or not defendant acted under extreme duress or under the substantial domination of another person.
>
> "(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects [sic] of intoxication.
>
> "(i) The age of the defendant at the time of the crime.
>
> "(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.
>
> "(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.
>
> "(l) After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. . . ."

INTRODUCTION

Last term, the Court recognized deficiencies in California's death penalty sentencing scheme when it granted defendant's petition for certiorari in Bacigalupo v. California, No. 91-8445, and remanded to the California Supreme Court for reconsideration in light of Stringer v. Black 503 U.S. ___, 117 L.Ed.2d 367, 112 S.Ct. 1130 (1992). So far, the California court has not acted.

This month, virtually the same questions are presented to this Court in this petition, and simultaneously in several others.[2/] The frequency with which California death judgments pose Eighth Amendment issues illustrates a serious deficiency in that State's death penalty statute, which this Court should address.

STATEMENT OF THE CASE

Procedural History

On April 23, 1982, 20-year-old William Arnold Proctor (hereafter "petitioner") was arrested in connection with the

---

2/ These cases are already pending:
Johnson v. California, No. 92-8822
Payton v. California, No. 92-9070.

Petitioner's counsel has been informed that petitions for certiorari raising the same issues are due (as is this petition) on July 8, 1993:
People v. Alcala, 4 Cal.4th 742 (1993)
People v. Noguera, 4 Cal.4th 599 (1993)
People v. Tuilaepa, 4 Cal.4th 569 (1993).

death of Bonita Bergh Stendal [CT 481-483, 500-501[3/]]. He had been released two weeks earlier from the custody of the California Youth Authority.

On May 5, petitioner was charged with three felony counts:

1. First degree murder of the victim (California Penal Code §187[4/]), with four special circumstances:

   a. Murder in the course of burglary (§§460 and 190.2(a)(17));

   b. Murder in the course of rape (§§ 261 and 190.2(a)(17));

   c. "Especially heinous, atrocious, or cruel, manifesting exceptional depravity" murder (§190.2(a)(14)) (petitioner's motion to dismiss this allegation was later granted) [CT 252-253]; and

   d. Intentional murder involving torture (§190.2(a)(18)) [CT 1:1-2:22].

3/ There were two reporter's transcripts in connection with the state court appeal. One reflects the guilt phase and mistried penalty proceedings in Shasta County. The other is for the subsequent retrial of the penalty phase in Sacramento County. These are identified by an introductory "Shasta" or "Sacto" (where clarity requires) followed by "RT", page number, colon and line numbers.
Most file documents appear in a single clerk's transcript, with unitary pagination, cited as "CT". The Shasta court's jury instructions are collected in a separate transcript, cited as "Supp. CT".

4/ All statutory references not otherwise qualified are to the California Penal Code.

2. Rape accompanied by great bodily injury (§§261.2 and 12022.8) [CT 2:23-3:3].

3. Burglary (§§261 and 12022.7) [CT 3:5-18; CT 6-8].

After a preliminary hearing, petitioner was held to answer for the three felonies [CT 4-5 and 10-155]. Petitioner pleaded not guilty to each charge and denied the "special allegations" [CT 159-160].

Two months before trial began, petitioner filed a motion for change of venue, which the court denied [CT 176-177, 180 and 196]. The day voir dire was completed, petitioner renewed his motion to change venue, but the court summarily denied the motion [CT 274-286].

The jury was seated on December 8, 1982. The trial lasted only four court days [CT 287-299]; the jury began deliberating on December 15 [CT 300]. On December 20, a day after the jury announced a potential deadlock, the trial judge commented on the evidence, including his view of petitioner's credibility. Within a few hours, the jury returned a verdict convicting petitioner of first degree murder with all then-remaining special circumstances, of rape with great bodily injury, and of first degree burglary with great bodily injury [CT 310-313].

The penalty phase began the next morning. After less than two hours of deliberation, the jury foreman announced the jury was deadlocked beyond possibility of reso-

lution, whereupon the court ordered a mistrial and discharged the jury [CT 314-315].

On January 6, 1983, petitioner again moved for a change of venue, this time successfully [CT 323-351]. The case was transferred to Sacramento County for retrial of the penalty phase only [CT 351-354]. The second jury returned a verdict finding that aggravating circumstances outweighed mitigating ones, and imposing the death penalty [CT 376-396 and 467-472].

On June 28, 1983, the Sacramento court (Hon. Sheldon H. Grossfeld) heard and denied petitioner's automatic motion for modification of judgment (§190.4(e)) [CT 528-555A]. Petitioner's appeal to the California Supreme Court followed automatically [CT 558]. The California Supreme Court did not hear argument until October, 1992.

ISSUES RAISED BELOW (RULE 14(h))

1. Stringer v. Black (Vagueness) Challenge:

Petitioner challenged the ambiguities inherent in California's statutory aggravating and mitigating factors, and their application in this particular case, in his original briefing below. Further, when the California Supreme Court ordered supplemental briefing in 1992, petitioner raised the issue regarding the validity of his sentence with specific reference to Stringer v. Black, supra, 503 U.S. ___, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992) and the California court address-

ed the issue in its opinion [App. A, Dissenting Opinion by Mosk, pp. 14-18].

2. Circumstances of the Crime Factor:

Petitioner raised a federal challenge to California's "circumstances of the crime" factor both in his initial briefing before the state court and his supplemental briefing, and the California Supreme Court addressed this issue in its opinion [App. A, pp. 71-73].

FACTUAL HISTORY

At about 7:50 p.m. on April 21, 1982, 55-year-old Bonnie Stendal was seen by a fellow schoolteacher shopping at the supermarket and drugstore near her home in Burney, a tiny town in rural northern California [RT 2367:25-2369:25 and 2370:5-19; CT 221][5/]. At the same time, however, a friend noticed Mrs. Stendal's car in the driveway of her home (where it was never previously parked, and in a muddy condition, though otherwise always kept clean); the lights in the house were on and drapes open [RT 2372:13-2273:20, 2375:1-25 and 2376:17-27].

Petitioner was seen walking in Burney, not far from the Stendal home, between 5:30 and 6:50 a.m. the following morning [RT 2707:23-2711:8, 2754:22-2757:10]. Mrs. Stendal

---

5/ All record references in this fact statement are to the Shasta County reporter's transcript, unless otherwise noted.

failed to arrive at school at her habitual 7:45 a.m. Around 8:55, a secretary called the teacher's home but got no answer [RT 2380:3-2382:2]. When she went to check the home, no one answered the door, so the secretary let herself in and walked through the house, seeing nothing more untoward than a toaster oven left open and clothes on the back of a chair. A look in the garage disclosed two cars, one of which Mrs. Stendal normally drove [RT 2382:3-2387:15].

After returning to school, the secretary called the Sheriff's office. Sgt. Larry Jarrett went to the home shortly thereafter [RT 2390:25-2391:15]. He deemed Mrs. Stendal's absence "very strange" and went through the house with that in mind [RT 2397:15-2398:13]. Sgt. Jarrett saw nothing unusual, finding the house "very neat in overall appearance" except for an open pickle jar, a fork on a counter and a drawer partly open; the living room was neat but with a blanket, heating pad, pillow and magazine on the couch and a suit and bathrobe also not put away, while there was only a sheet on the bed in the bedroom [RT 2398:14-2404:3].

After this five-minute inspection, Jarrett left to contact his lieutenant, and then returned to the Stendal home; this time he noticed that the silver Mercury -- which was inside the garage and the only operable car -- was muddy and dripping, with "wipe marks back and forth" on its trunk. He called a locksmith, who opened it but found nothing significant [RT 2404:12-2406:12].

At about 4:00 that afternoon, a couple passing through the area spotted a body off the road near Lake Britton. They notified authorities [RT 2393:5-2395:25]. The body was that of Mrs. Stendal, clad in a nightgown with her hands tied behind her back and cuts and "damage" to her face [RT 2406:13-2410:1]. Thereafter, a variety of law enforcement personnel of both Shasta County and the Department of Justice descended on the victim's home [RT 2410:2-2411:7], finding cut telephone wires inside the house [RT 2416:2-25] and blood-stains on a dresser [RT 2498:8-2499:7].

Eight days after the body was found and all this investigation conducted, two of the local deputies returned to the Stendal home and, apparently for the first time, moved the victim's bedding and found underneath it "around a dozen book-lets", some of which had blood on them [RT 2444:3-2445:25]. These were eventually shown to reflect petitioner's handprint [RT 2502:19-2511:23, 2560:24-2568:14, 2828:8-20, 2830:9-2832:15, 2844:20-27]. The officers also dusted the house for fingerprints, unsuccessfully [RT 2445:26-2446:23, 2829:21-26].

Still later, on May 2, ten days after the body was found, Sgt. Jarrett "observed a cigarette butt on the -- I guess it would be on the east side of the residence . . . in the vicinity of a window", the butt being of a non-filter cigarette. Nothing in the record indicates the butt had been there any closer to the time of the offense; the contrary is shown by the fact it went unnoticed through mass police

searches of the inside and outside of the Stendal home and a civilian "clue hunt" [RT 2410:2-2411:7, 2442:14-2445:28, 2463:2-2465:13, 2495:21-2496:9; CT 216A, 216C, 221-223]. On the sill of a window Sgt. Jarrett saw indications that a hand had been on the dust, but no print could be obtained [RT 2448:7-2450:1].

The cause of death was asphyxiation, first (in the coroner's opinion) by nonfatal manual strangulation and later by ligature strangulation [RT 2875:17-2876:5]. Mrs. Stendal's body also showed cuts and bruises from blunt force and various internal injuries, inflicted by seven to nine blows [RT 2876:6-2877:28, 2879:1-24, 2886:16-2889:5], and a number of stab wounds and incisions made by a cutting instrument [RT 2889:6-2922:27]. Postmortem injuries were attributed to dragging of the already-dead body; these were deemed to rule out the place of discovery as the site of the killing [RT 2879:25-2884:22].

There were four stretching injuries outside the vagina and a fifth abrasion which was said to slide into the opening of the vagina [RT 2913:27-2914:8, 2915:16-2917:3]. The coroner opined that these were caused by more than one force, four by a foreign object, possibly a penis though of a type more often caused by something else, and a fifth probably by a penis [RT 2917:4-2918:22, 2919:7-28]. There was no lub-rication of the area, nor was there any sign of semen in or about any portion of the body [RT 2918:23-2920:12].

The autopsy surgeon described the knots which tied the victim's hands as possibly "truckers' hitches" knots [RT 2912:22-2913:27]. A truck-driving teacher identified a "truckers' hitch" as a knot taught to persons taking vocational training in trucking, such as a class petitioner had attended [RT 2730:20-2731:21].

A Shasta officer observed abrasions and apparent scratch marks on petitioner's legs, and watched another officer photograph them [RT 2540:24-2543:20; Exhibit 43]. The following day, these marks were shown to Dr. Stephens, who described them as one to four days old, and testified that he examines sexual assault victims in San Francisco and has seen "these injuries" in "a sexual assault case" [RT 2543:26-2544:6, 2927:9-2928:1]. Dr. Stephens also checked petitioner for blood but none was found, nor were there any fibers consistent with ones found in the Stendal car [RT 2580:6-2581:16, 2583:28-2584:17, 2947:8-2948:27]. He found no defensive wounds, scraped knuckles (from blows) or the like on petitioner's person [RT 2950:17-2951:27].

Petitioner's mother testified he lived at her home during the 14-day interval between his release from Youth Authority custody and the night of the 21st/22nd, but was not there that night; he had phoned at 8:00 or 8:30 p.m. to say he was at the home of another youth, Robert Manley [RT 2721:9-2722:4]. Manley, however, testified that petitioner left at 8:30 p.m. on the 21st [RT 2643:9-12].

Manley had been petitioner's cohort in committing the crime which produced the Youth Authority sentence both had served, and had also just been released. Manley had made an obscene call to Mrs. Stendal the weekend before her death, although he had been too drunk to know who dialed [RT 2684:10-2685:25]. Manley had previously broken into the Stendal home at least twice, and generally spent a lot of time there when Mrs. Stendal's son, David, was at home [RT 2672:8-2676:23, 2758:27-2759:26, 2761:16-2764:9, 2768:3-2770:27]. There was no evidence of petitioner's involvement in any break-ins. David Stendal knew that petitioner had been acquainted with Mrs. Stendal and had visited the home frequently, but had never acted disrespectfully towards Mrs. Stendal [RT 2764:10-2765:25].

REASONS FOR GRANTING CERTIORARI

I.

CALIFORNIA'S DEATH PENALTY LAW IS UNCONSTITUTIONALLY VAGUE BECAUSE IT DOES NOT SPECIFY WHICH FACTORS ARE AGGRAVATING AND BECAUSE IT PERMITS LACK OF MITIGATING CIRCUMSTANCES TO BE CONSIDERED AS AGGRAVATING.

Under California's 1978 death penalty law, once a defendant has been found guilty of murder with "special circumstances", a jury must determine whether to impose a sentence of death or life imprisonment (California Penal Code §190.3). In making this determination, the jury must weigh the eleven aggravating and mitigating factors set forth at pp. 3-4, above. The statute, however, does not designate which

factors are aggravating and which are mitigating, nor does it give the jury any guidance as to how these factors should be applied (§190.3).

Capital sentencing statutes must provide specific, objective standards to guide a jury's discretion. Sentencing a defendant on the basis of factors that are unduly vague creates the risk of arbitrary and discriminatory imposition of the death penalty (Stringer v. Black, supra, 112 S.Ct. at 1139; Maynard v. Cartwright, 486 U.S. 356, 361-365, 108 S.Ct. 1852, 1857-1859, 100 L.Ed.2d 372 (1988); Godfrey v. Georgia, 446 U.S. 420, 428-433, 100 S.Ct. 1759, 1764-1767, 64 L.Ed. 2d 398 (1980)). Last year the Court wrote:

> "Although our precedents do not require the use of aggravating factors, they have not permitted a State in which aggravating factors are decisive to use factors of vague or imprecise content. A vague aggravating factor employed for the purpose of determining whether a defendant is eligible for the death penalty fails to channel the sentencer's discretion. A vague aggravating factor used in the weighing process is in a sense worse, for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying on the existence of an illusory circumstance" (Stringer v. Black, supra, 112 S.Ct. at 1139).

The Court went on to direct that "when the weighing process has been infected with a vague factor the death sentence must be invalidated" (Id.).

Here, there is more than merely a lone vague factor. The entire California death penalty scheme is vague.

A. THE OVERALL VAGUENESS OF CALIFORNIA'S STATUTE

None of California's eleven listed aggravating and mitigating factors is adequately defined for purposes of the Eighth Amendment.

The first factor, for example, allows the jury to consider the "circumstances of the crime" (California Penal Code §190.3(a)).[6/] But are these circumstances aggravating factor or mitigating? What is the scope of the crime's "circumstances"? Is there a time limit on this consideration?

A jury may take into account "whether or not the defendant was an accomplice to the offense" (§190.3(j)). But the statute does not specify whether this creates a circumstance in aggravation or mitigation. The confusion wrought by this particular factor is evident in petitioner's case. The trial judge, in deciding whether or not to modify the jury's death verdict, stated that because defendant acted alone, as opposed to being an accomplice, this was an aggravating factor [Sacto RT 1627:28-1628:7]. In the California Supreme Court, petitioner argued that this ruling was error and "factor (j)" could only be used as a mitigating factor.

The State Supreme Court was divided on this issue. The majority noted that, although there was an established line of cases indicating that factor (j) was only a mitigating factor, one recent decision approved the trial court's treat-

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6/ This factor will be discussed in greater detail in Section II of this petition.

ment of evidence that defendant was the sole participant as aggravating evidence [App. A, pp. 73-74].[1/] Two justices disagreed, finding that there was no precedent for treating factor (j) as anything other than mitigating [App. A, Concurring and Dissenting Opinion of Kennard, J., pp. 4-6, Dissenting Opinion of Mosk, J., p. 17]. If the effect of this factor is the subject of debate among justices sitting on California's highest court, the law cannot be clear enough to channel the jury's discretion, as required under the Eighth Amendment (Stringer, supra, 112 S.Ct. at 1139).

Section §190.3(i) instructs the jury to consider the "age of the defendant" at the time of the crime. As with the other factors, however, there is no guidance on whether the jury should consider this statistic to be an aggravating or a mitigating circumstance. Is an 18-year old "too young to know better" but a 30-year old "old enough to know what he was doing"? The jury has unfettered discretion in interpreting the import of age.

The existence, or non-existence, of the remaining eight factors can lead to equally divergent conclusions. A defendant's mental illness, intoxication, or extreme duress may be mitigating (§190.3(d) and (g)), but is a clear mind an

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[1/] The State court concluded any error concerning factor (j) was harmless because "The court did not consider twice the evidence that defendant had acted alone in conceiving and carrying out the offense" [App. A, p. 75]. This misses the point. The question is whether the instruction adequately guided the jury's consideration of evidence.

aggravating factor? A violent or extensive criminal history could be a circumstance in aggravation (§190.3(b) and (c)), but should the jury consider lack of a record to be a mitigating circumstance? If the victim participated in the crime, the jury reasonably could assume this is a mitigating factor (§190.3(e)). But if the victim was not a participant, is this an aggravating factor? A defendant's reasonable belief that the crime was morally justified may be a mitigating circumstance (§190.3(f)), but does the absence of this belief create aggravation?

As is readily apparent from an inspection of these eleven factors, California's death penalty law is totally lacking in the "requirement that aggravating factors be defined with some degree of precision" (Stringer, supra, 112 S.Ct. at 1136). Accordingly, this Court's guidance is needed in determining whether California's law comports with the requirements of the Eighth Amendment.

B. PARTICULAR EFFECTS IN THIS CASE

The generalized inadequacy of California's death penalty scheme was exacerbated in this case by the prosecutor's arguments and by a mandatory death sentence instruction.

1. Prosecutor's Argument -- "All But Two Factors Are Aggravating"

The prosecutor here took advantage of the statute's failure to label particular factors as aggravating or mitigat-

ing by telling the jury that nine of the factors were aggravating:

> "Okay. Before I close, I would like to go over those factors, and I submit to you that in looking over those factors, there are only two mitigating circumstances and the rest in this case are aggravating" [Sacto RT 1476:21-24, emphasis added].

He then went on to state that the only two mitigating circumstances were petitioner's lack of prior violent activity [Sacto RT 1477:11-17] and the fact that petitioner was only 20 at the time of the murder [Sacto RT 1479:16-19]. Every one of the remaining nine factors the prosecutor labeled as "aggravating".

He argued that the "circumstances of the crime" constituted an aggravating factor [Sacto RT 1476:25-1477:10], as did the fact that petitioner had a prior felony conviction [Sacto RT 1477: 18-22]. He claimed that because there was no evidence that petitioner acted under the influence of a mental or emotional disorder, "that is a circumstance in aggravation" [Sacto RT 1477:23-1478:9].

The prosecutor argued that because the victim did not consent to the homicide, "that clearly is a circumstance in aggravation" [Sacto RT 1478:10-14]. The same was claimed to be true because petitioner did not reasonably believe the crime was justified [Sacto RT 1478:15-23] and because petitioner did not act under extreme duress [Sacto RT 1478:24-28]. The prosecutor also found aggravating circumstances from the fact that petitioner was not intoxicated, had no mental

disease [Sacto RT 1479:1-15], and acted without an accomplice [Sacto RT 1479:20-1481:1].

In other words, the prosecutor led the jury to believe that the absence of a mitigating circumstance must be an aggravating circumstance, precisely the danger created by the unspecific statute.

2. The Mandatory Death Sentence Instruction

Another feature of this case which made the vagueness of California's death penalty scheme so devastating was the presence of a jury instruction which mandated a death sentence if aggravating circumstances outweigh mitigating ones:

> "After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account, and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.
>
> "If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death" [Sacto RT 1557:24-1558:4, emphasis added; and see CT 454].[8/]

Such an instruction is calamitous in a case such as this where the jury was led to believe that the absence of a mitigating circumstance equaled an aggravating circumstance.

8/ Although this pattern jury instruction was used in California, at the time of petitioner's trial, California authorities now state that a court "should NEVER instruct the jury in penalty phase that it 'shall' impose a sentence of death" (1 California Jury Instructions (5th ed., 1988), page 417, "Use Note" to CALJIC 8.88, emphasis in the original; and see People v. Brown 40 Cal.3d 512, 538-544 (1985)).

As indicated above, the prosecutor, himself relying on such a misunderstanding, argued that there were nine aggravating circumstances, and only two factors in mitigation. Armed with the "shall impose . . . death" instruction, the prosecutor was also able to argue that this array of illusory aggravating circumstances compelled a death sentence under California law.[9/]

Just last year, this Court stated that "Employing an invalid aggravating factor in the weighing process 'creates the possibility . . . of randomness'. . . by placing a 'thumb on death's side of the scale'", thus "'creat[ing] the risk [of] treat[ing] the defendant as more deserving of the death penalty'" (Sochor v. Florida, ___ U.S. ___, 112 S.Ct. 2114, 2119 L.Ed.2d ___ (1992), quoting Stringer v. Black, supra, 112 S.Ct. at 1137). A system which allows the State to exploit otherwise mitigating circumstances and turn them into aggravation, and then requires the jury to impose death if aggravating factors outweigh mitigating factors places an entire hand and arm on death's side.

9/ The prosecutor reiterated this mandatory "shall" instruction several times in his argument [Sacto RT 1473:20-1474:23], concluding by telling the jury to "return a death verdict not because you want to but because under the law of California it's necessary" [Sacto RT 1843:25-28, emphasis added].

II.

THE "CIRCUMSTANCES OF THE CRIME" FACTOR IS UNCONSTITUTIONALLY VAGUE, ESPECIALLY WHERE A JURY THAT DID NOT DETERMINE DEFENDANT'S GUILT HAS THE RESPONSIBILITY OF RECOMMENDING HIS SENTENCE.

Even if this Court declines to reach the issue of whether California's death penalty scheme, as a whole, violates the Eighth Amendment, it should consider whether the "circumstances of the crime" factor deprived petitioner of Eighth Amendment protection.

Under California's "factor (a)", when a jury is considering whether or not to recommend the death penalty, it must appraise the "circumstances of the crime", including the existence of any special circumstances found to be true.[10/] Yet this factor fails to identify any qualitative aspect of the offense which properly aggravates punishment.

The vagueness of this factor was unusually insidious for petitioner because the jury which heard the penalty phase was not the one which had determined his guilt. In the penalty trial the circumstances of the crime was the subject receiving by far the greatest emphasis.

This Court has held that an aggravating factor that instructs the sentencer to look at the circumstances of the crime to see if it was "heinous, atrocious and cruel" is unconstitutional (Shell v. Mississippi, 498 U.S. ___, 111 S.Ct.

10/ Of course, the jury would not be deliberating the issue of life or death if there were no special circumstances found to be true.

313-314, 112 L.Ed.2d 1 (1990); Clemons v. Mississippi 494 U.S. 738, 110 S.Ct. 1441, 1443-1444, 108 L.Ed.2d 725 (1988); Maynard v. Cartwright, supra, 486 U.S. at 361-364, 108 S.Ct. at 1857-1859). Similarly, an aggravating circumstance that instructs the sentencer to look at the circumstances of the crime to see if it was "outrageously or wantonly vile, horrible or inhuman" is unconstitutional (Godfrey v. Georgia, supra, 446 U.S. 420, 428-433, 100 S.Ct. at 1764-1767).

It follows from these cases that an aggravating factor that merely instructs the sentencer to look at the circumstances of the crime, without attempting any further limitation or guidance, is even more vague. Indeed, in several cases this Court has held that a sentencer may not simply look at the circumstances surrounding a crime and determine that a death penalty is appropriate (Maynard v. Cartwright, supra, 486 U.S. at 363, 108 S.Ct. at 1859; Godfrey v. Georgia, supra, 446 U.S. at 429-433, 100 S.Ct. at 1765-1767; Furman v. Georgia, 408 U.S. 238, 255-257, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), concurring opinion of Douglas, J.). As Maynard stated, this Court has "plainly rejected the submission that a particular set of facts surrounding a murder, however shocking they might be, were enough in themselves, and without some narrowing principle to apply to those facts, to warrant the imposition of the death penalty" (486 U.S. at 363, 108 S.Ct. at 1859).

CONCLUSION

Petitioner's jury was misinstructed in a manner which left it no effective guidance, and which made it possible for the prosecutor to distort neutral circumstances into aggravating factors. California's inadequate death penalty statute made this possible.

This Court should grant certiorari and provide badly needed guidance concerning the invalidity of California Penal Code §190.3.

Dated: July 7, 1993

Respectfully submitted,

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SUPREME COURT
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Robert Wandruff Clerk
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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. WILLIAM ARNOLD PROCTOR, Defendant and Appellant.	S004555/CR23185

Following the guilt phase of a jury trial held in Shasta County, defendant William Arnold Proctor was found guilty of various offenses committed against Mrs. Bonita Stendal: first degree murder (Pen. Code, §§ 187, 189),1/ forcible rape (§ 261, subd. (2)), and first degree burglary (§ 460). The jury also found that defendant inflicted great bodily injury (§ 12022.8), and found true the special circumstance allegations that he committed the murder in the course of rape (§ 190.2, subd. (a)(17)(iii)), in the course of first degree burglary (§ 190.2, subd. (a)(17)(vii)), and with

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1/ All further statutory references are to the Penal Code unless otherwise indicated.

SEE CONCURRING AND DISSENTING OPINIONS

the infliction of torture (§ 190.2, subd. (a)(18)). After the court declared a mistrial as to the penalty phase of the trial, defendant's motion for change of venue was granted as to that phase, and after further proceedings a jury in Sacramento County imposed the death penalty. After denying defendant's motion for modification of the verdict, the court sentenced defendant to death. This appeal is automatic. (§ 1239, subd. (b).) We affirm the judgment in its entirety.

FACTS

The evidence at trial established that on the evening of April 21, 1982, defendant entered the residence of Mrs. Bonita Stendal, a widow living alone, and sometime that evening or early the next morning, raped, tortured, and murdered her. Defendant then transported her body in the trunk of her automobile to a site near a lake 12 miles away, where he pushed the body off an embankment.

I. GUILT-PHASE EVIDENCE

A. The prosecution's case.

1. The crimes.

Mrs. Bonita Stendal, 55 years of age, lived on Ponderosa Street in Burney, a small mountain community located 35 miles east of Redding in Shasta County. Mrs. Stendal taught first grade students at the East Burney Elementary School. The last person (other than defendant) to see her alive on the evening of April 21, 1982, was a fellow schoolteacher, Robert Schmidt, who briefly spoke with her at

the supermarket in Burney and then encountered her 10 minutes later at the nearby drugstore, approximately 7:50 p.m.

Later the same evening, Mrs. Stendal's neighbor, Patty Olinger, was seated in her automobile as it was being pushed through the intersection at Marquette and Ponderosa Streets, when she observed Mrs. Stendal's muddy vehicle parked in the driveway of Mrs. Stendal's residence on Ponderosa Street.[2/] During the two-year period of their acquaintance, Olinger had known Mrs. Stendal always to park her vehicle inside her garage and never in the driveway, and had known her always to keep her vehicle clean. Olinger observed the lights on inside Mrs. Stendal's residence at this time.

Approximately 8:55 a.m. the following morning, Dena Humble, the secretary at Mrs. Stendal's school, was notified that Mrs. Stendal had failed to arrive. Upon telephoning Mrs. Stendal's residence and receiving no response, she telephoned Mrs. Stendal's next-door neighbor and teaching assistant, who informed Humble she did not know where Mrs. Stendal was. Humble then proceeded to Mrs. Stendal's residence, letting herself in the unlocked door and walking through the house when no one responded to her knock. Humble noticed a fork was on the kitchen counter, and the oven door was open. Inside

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2/ This witness testified she observed the vehicle in that condition and location, approximately 7:50 p.m. that evening. This reported time does not correlate with the testimony of other witnesses as to the relevant time periods.

the garage, Humble noticed a light was on and both of Mrs. Stendal's automobiles were inside. Returning to school, Humble notified the police.

Approximately 9:30 that morning, Sergeant Larry Jarrett of the Shasta County Sheriff's Department conducted a brief search of the Stendal residence. He observed that the house was very neat overall. There was an open pickle jar and carving fork on the kitchen counter, and a drawer containing carving forks and large knives was partly open. In the bedroom, the bed was covered only by a sheet.

Sergeant Jarrett departed to report to his superior, Lieutenant Phil Eoff, and shortly thereafter, accompanied by Sergeant Michael Shaeffer, an officer specializing in evidence and identification, they searched the residence more thoroughly. This time, the officers noticed that the telephone lines leading to the kitchen and den telephones had been severed, and the drapes in the den had been pulled off the hooks at one end. The officers also observed that one of the two vehicles in the garage was muddy, water was dripping from its fender wells, and there were wipe marks across the entire outside lid of its trunk. After a locksmith opened the trunk, it was discovered that the items inside appeared to have been pushed into the outer edges of the trunk, and the dust inside recently had been disturbed.

At 4 p.m. that same day, April 22, 1982, newlyweds Robert and Susan Porter stopped their vehicle on the shoulder

of the road near an embankment at Lake Britton, located 12 miles from Burney, in order to let out their dog and take a photograph of the scenery. When Robert Porter looked over the embankment, he discovered a body lying approximately 11 feet from the road. The couple telephoned law enforcement authorities and waited by the body for their arrival.

Sergeant Jarrett identified the body as that of Mrs. Stendal. It appeared to have been thrown from the roadway. Tire tracks of the same design as those made by the tires on Mrs. Stendal's automobile ran perpendicular to the road, and, from the tire tracks, drag marks led to the top of the embankment. The body was clad in a nightgown pulled up to the waist, and an unknotted scarf was draped around the neck. A green electric blanket covered the body. The hands were tied behind the victim's back with four sets of ligatures, made of cloth and nylons, by means of various types of "half-hitch" knots. There were some cuts and "damage" to the face.

On the morning of April 23, Sergeant Jarrett, accompanied by Shaeffer and several other experts, returned to Mrs. Stendal's house in order to take photographs and obtain fingerprints. Beneath an area rug on the bedroom floor, they discovered a small pool of blood, still damp, which proved to be the same type as Mrs. Stendal's blood. Other bloodstains were located on the knob of the bedroom dresser.

That same day, the authorities brought several longtime acquaintances of Mrs. Stendal into the residence.

These individuals observed that a brown or beige purse she frequently used was missing, and that certain circumstances, such as the unlocked front door and missing bedspread and blanket, were unusual because Mrs. Stendal always locked the residence and kept it very neat.

On April 24, Dr. Boyd Stephens of the San Francisco County Coroner's office performed an autopsy on the body. He estimated that Mrs. Stendal had been killed some time between the early evening hours of April 21 and the early morning hours of April 22. She was not killed at the location at which her body was found but had been transported there after death.

In Dr. Stephen's opinion, Mrs. Stendal's death was caused by asphyxiation, initiated by nonfatal manual strangulation and later by ligature strangulation. The face had suffered numerous cuts and bruises from a blunt force. The eyes were swollen shut and the nose and lips also were swollen. Dr. Stephens believed that most of these injuries resulted from seven to nine blows. There were various internal injuries in the area of the neck. There were a number of shallow stab wounds and incisions caused by dragging a weapon across the skin in the area of the neck. The curvature of some of the injuries indicated they had been inflicted slowly and deliberately. There were seven wounds less than two inches deep to the area of the right breast which had been inflicted while Mrs. Stendal still was alive

but unable to move away from her assailant. In Dr. Stephens' opinion, these wounds were inflicted for the purpose of causing pain or fear.

Prior to death, Mrs. Stendal had suffered four stretching injuries on the labia and a fifth injury which extended into the opening of the vagina. In the coroner's opinion, four of these probably were caused by a foreign object, and the fifth, probably by a penis. There was no semen inside or on the body.

Also while alive, Mrs. Stendal had received a blunt-force injury to the area of her right kidney. There also were blunt-force injuries to her left foot. The ligatures used to tie her hands were tied so tightly they had cut into her wrists. There were post-mortem abrasion injuries attributed to dragging the body.

On April 30, the officers returned to the Stendal residence to perform a systematic investigation. On this occasion, they noticed small amounts of blood on the bedroom nightstand. After dismantling and removing the bed, they found, near the location of the head of the bed, approximately one dozen pamphlets. Some of the pamphlets had blood on them and one appeared to contain a bloody palm print. Other latent palm prints were obtained from the booklets. The blood on some of the pamphlets later was identified as being of the same type as Mrs. Stendal's. The door to the master bedroom on the side facing the den appeared to have been wiped with a damp, dirty rag.

On May 2, Sergeant Jarrett returned to the residence and noticed a cigarette butt from an unfiltered cigarette lying outside a window of the residence; there were also indications a hand had been on the window sill (although no fingerprints could be obtained).

2. Evidence of defendant's involvement.

In view of the circumstantial nature of the evidence connecting defendant to the commission of the crimes, and the nature of the defense that was presented at trial, we consider it necessary to set forth in substantial detail the evidence relating to defendant's activities immediately preceding and following the commission of the murder.

Mrs. Stendal's son David (who was approximately 21 years of age at the time of trial) had lived with Mrs. Stendal until 1979, when he moved to Chico. David had known defendant (20 years of age at the time of trial) and Robert Manley (26 years of age at the time of trial) for several years and often had smoked marijuana with them. David had concealed marijuana in various locations within the Stendal residence until sometime in 1979 or 1980. Manley resided with his mother, Neta Manley, less than one block from the Stendal residence.

From February 18, 1981, to April 9, 1982, defendant was not present in the Burney area. In late January 1982, defendant commenced a four-week general truck-driving course at Western Truck School, where he received instruction in

tying knots. Students at the school were taught to tie several types of trucker's-knots, which knots were identical to those found on the ligatures used to bind Mrs. Stendal's wrists.

Approximately two weeks prior to the murder of Mrs. Stendal, defendant returned to live with his mother and two brothers in Burney. In the early morning hours of either Friday or Saturday, April 16 or 17, defendant and Robert Manley made four or five obscene or "crank" telephone calls from the Manley residence to various Burney residents. Robert Manley telephoned Mrs. Stendal and told her he would like to have sexual relations with her. Defendant made a separate obscene telephone call to an unnamed person.

On April 21, 1982, defendant hitchhiked to the Manley residence, arriving approximately 2 p.m. Mrs. Manley returned from work at 3 p.m. Prior to 5 p.m., Mrs. Manley drove defendant to a market in Burney to purchase liquor. When they returned to the Manley residence, the three had a drink and then ate dinner at 5 p.m. Approximately 5:30 p.m., defendant and Robert Manley walked to a local convenience store, where Manley purchased two packs of unfiltered Camel cigarettes (the brand and type they both smoked), giving one pack to defendant. They returned to the Manley residence to drink and watch a baseball game on television, and remained there after Mrs. Manley departed at 7 p.m. Defendant had three or four drinks. The baseball game commenced

approximately 7:35 p.m. Between 8 p.m. and 8:30 p.m., defendant telephoned his mother to report he was at the Manley residence and intended to remain there for the night.

Approximately 8:30 p.m. defendant departed, informing Robert Manley that he was going to one of the local bars to "pick up" a woman and would return later to spend the night. When he left, defendant was wearing thongs, white socks, blue jeans, a blue shirt, and a gold-colored windbreaker borrowed from Robert Manley, because defendant did not have his own jacket with him. Shortly after 8:30 p.m., defendant arrived at the residence of his friend Jeffrey Bohall, who lived five to six blocks from the Manley residence and four to five blocks from the Stendal residence. Defendant remained at that location until sometime before 10 p.m., when he departed in order to have a few drinks and "get a piece of butt." Defendant inquired whether Bohall wanted to accompany him but Bohall declined. Bohall's mother, Juanita Bohall, who was home during defendant's visit, testified that defendant was wearing blue jeans and an off-white or cream-colored lightweight jacket with a rust-brown trim. She could not clearly remember his shoes but thought they were light weight.

When Mrs. Manley returned to her residence between 10:30 p.m. and 11 p.m. that evening, defendant was not present. When Robert Manley retired at 2:30 a.m. after watching the baseball game and a late-night movie, defendant still had not returned. When Mrs. Manley left for work

between 5:30 and 6 a.m., defendant was not at the Manley residence. According to defendant's mother, Julia Proctor, defendant did not return to the Proctor residence during the night of April 21.

After sunrise, at 5:30 a.m. on the morning of April 22, defendant's aunt, Sharon Palkki, observed defendant walking across the street in front of Palkki's residence, which was located approximately 500 feet from Mrs. Stendal's residence, several miles from defendant's residence in Johnson Park on the outskirts of Burney. Defendant was wearing loose-fitting blue jeans, white socks, and sandals, and what appeared to be a pair of gloves was dangling from his right pants pocket. Between 6 a.m. and 7 a.m., defendant telephoned his brother, Ed Proctor, instructing him to have their mother give defendant a ride home from the local market. Another witness observed defendant telephoning from that location during the same time period. When defendant's mother picked him up, defendant was wearing blue jeans and a gold-colored windbreaker, which she did not recognize. His mother did not remember the type of footwear defendant was wearing but testified he owned a pair of thongs.

Approximately 11:30 a.m. on April 22, Robert Manley arose and telephoned defendant, who informed Manley that defendant had seen his (defendant's) mother downtown the previous evening and had driven home with her. When Robert Manley asked defendant whether he had watched the baseball

game, the late-night movie, or any other television program at home, defendant responded he had not, and stated he was tired and wanted to sleep. Defendant agreed to meet Robert Manley after doing defendant's laundry. Later that day, Robert Manley and his mother drove to the Proctor residence, where they picked up defendant. They proceeded to Redding in order to purchase tickets to a concert. Defendant returned Robert Manley's jacket at that time, and Manley observed it was cleaner than it had been when he had given it to defendant the previous evening. After being dropped off and obtaining the tickets, Robert Manley and defendant met two women and spent the night with them at a motel in Redding.

On the morning of April 23, Shasta County officers brought defendant and Robert Manley to the sheriff's station for questioning. Defendant told Sergeant Jarrett that he had been at Robert Manley's residence until 8:30 p.m. on April 21 and then had gone into Burney. Defendant stated he had received a ride home that evening from an unidentified man in a pickup truck. At his residence, defendant had sharpened some knives for his mother, and had been home several hours before retiring at 11 p.m. Defendant did not arise until 9 a.m. on April 22, and did not leave the residence until after 3 p.m., when he went to Redding with Robert Manley and spent the night at a motel. Defendant showed Jarrett a motel room receipt, which defendant volunteered he had kept "for an alibi in case anything flared up." Defendant denied having visited Mrs. Stendal's residence.

Defendant was placed in custody for a parole violation he admitted to the officers. One of the officers observed that defendant had suffered abrasions below each knee, and that there were what appeared to be five or six somewhat parallel scratch marks above defendant's right knee. On April 24, Dr. Stephens examined defendant's leg injuries and determined they probably were two days old, and had not been sustained through any layers of clothing but rather while defendant's legs were uncovered. The injuries were similar to injuries Dr. Stephens had observed in other sexual assault cases.

On May 1, Mrs. Proctor visited defendant in custody and afterward informed one of the detectives that her son had asked her to tell Sergeant Jarrett that he had been at home on the night of the murder. When Mrs. Proctor had advised defendant she already had told Jarrett otherwise, defendant asked her to tell Jarrett that defendant had been at a party that evening.

The bloody palm print obtained from one pamphlet proved to match defendant's palm print, and the other, latent palm prints obtained from the booklets also matched defendant's palm prints. A very faint print from footwear was found at the location where the body was discovered and proved to be similar in design to the tread of a pair of thongs recovered from defendant's possession. On May 2, defendant was placed under arrest for the murder of Mrs. Stendal.

B. The defense case.

Defendant had known Robert Manley for several years prior to the murder. He testified he was acquainted with David Stendal, had known Mrs. Stendal approximately three to four years, and had been inside the Stendal residence on twenty or thirty occasions. Defendant testified that Manley and David Stendal had used marijuana and amphetamines on many occasions, and Manley had broken into the Stendal residence on at least two prior occasions. A defense investigator testified that Manley had informed him that one of the entries had been for the purpose of locating drugs.

Defendant testified that, after drinking the previous evening, he had awakened on the Monday or Tuesday morning prior to the day of the murder, with the bruises on his legs which the officers later had noticed. Defendant further testified that on the afternoon of April 21, 1982, he and Manley drank whiskey mixed with cola at the Manley residence. Defendant and Manley wanted to attend a concert in Chico, and Manley began to talk of retrieving various drugs which he knew David Stendal had secreted in the Stendal residence, and which defendant believed Manley intended to sell in order to raise money to purchase the tickets. After having two or three drinks, defendant left the Manley household shortly after 8:30 p.m. and proceeded to Jeffrey Bohall's residence, where he remained until 9:30 or 10 p.m. After Bohall refused to accompany defendant to "party,"

defendant left on foot to purchase Camel Light, filtered cigarettes (his brand and type) at a liquor store. The walk to the store took him one and one-half hours, and he returned to Manley's residence approximately midnight.

Upon arriving, defendant was unable to locate Manley and retired to an upstairs bedroom. Defendant awoke several hours later, at dawn on April 22. Defendant could not find Manley, but at this time discovered a note addressed to defendant on the side of the dresser, notifying him that Manley had departed to "check Stendal's stash" and would return shortly. Defendant decided to follow Manley to the Stendal residence.

When defendant arrived, the garage door was open but Mrs. Stendal's automobile was not inside the garage. The lights were turned on in the front room, and after no one responded to his knock, defendant entered through the unlocked sliding glass door. Defendant did not locate either Robert Manley or Mrs. Stendal, but noticed a puddle of blood next to the bed that he "just kind of tested" by touching it with the back of his hand. He noticed some pamphlets between the bed and a nightstand but did not recall touching the pamphlets upon which his palm prints later were detected. Defendant immediately ran out the back door to the market, where he telephoned his mother to ask that she pick him up. At home, defendant slept for several hours and telephoned Robert Manley approximately 1:30 p.m. on April 22. He did not launder his clothing.

After defendant and Manley were dropped off in Redding by Manley's mother, Manley told defendant that the previous evening, Mrs. Stendal had become ill and Manley had driven her to the hospital. Manley could not explain to defendant why there was blood on the floor of the Stendal residence.

The jury found defendant guilty of first degree murder, rape, and burglary, with an enhancement for great bodily injury, and found true the three charged special-circumstance allegations. After the jury could not agree as to penalty, a mistrial was declared. Defendant renewed his motion for change of venue, which was granted, and retrial of the penalty phase was conducted in Sacramento County.

II. PENALTY-PHASE EVIDENCE

A. The prosecution's case.

The prosecution presented evidence to the Sacramento County jury substantially similar to the evidence presented to the Shasta County jury, including the following: that Mrs. Stendal was last seen alive shortly before 8 p.m. on April 21, 1982; that when she failed to appear the following day for school, a brief search commenced; that the body was discovered on April 22, 1982; and that subsequent forensic examination of the body revealed the injuries described above. The evidence obtained at Mrs. Stendal's residence was presented, as was the testimony of Mrs. Manley and Robert Manley concerning

defendant's actions and whereabouts on the evening of the murder. The two witnesses who had observed defendant near the murder scene early on the morning of April 22, 1982, testified. The prosecution presented the evidence of defendant's familiarity with trucker's-knots. In addition, the prosecutor and defense counsel stipulated that in 1980 and 1981, defendant had suffered two second degree burglary convictions, and in 1981 also had been convicted of vehicle theft.

B. The defense case.

The defense presented two witnesses. Defendant's brother Ed testified that defendant did not have difficulty getting "dates." At 9 a.m. on April 22, 1982, Ed returned from a trip to find defendant at the Proctor residence. From that time until 12 p.m., defendant helped Ed repair a vehicle. Defendant did not wash his clothes that morning.

Defendant's mother testified that defendant's father left the family in 1981. Defendant had dropped out of high school after his sophomore year. Defendant's mother characterized him as a follower who was easily led. Defendant's mother had not known him to be hostile or disrespectful to women in general, or to say anything derogatory about Mrs. Stendal in particular.

At the conclusion of the penalty phase, the jury fixed the penalty at death.

DISCUSSION

I. GUILT-PHASE ISSUES

A. Motion for change of venue.

Defendant contends the trial court erred in denying his repeated motions for change of venue.[3/] Pursuant to section 1033, subdivision (a), the court must grant a motion for change of venue if "there is a reasonable likelihood that a fair and impartial trial cannot be had in the county." The phrase "reasonable likelihood" in this context "means something less than 'more probable than not,'" and "something more than merely 'possible.'" (People v. Bonin (1988) 46 Cal.3d 659, 673.) In ruling on such a motion, as to which defendant bears the burden of proof, the trial court considers as factors the gravity and nature of the crime, the extent and nature of the publicity, the size and nature of the community, the status of the victim, and the status of the accused. (People v. Edwards (1991) 54 Cal.3d 787, 807; People v. Cooper (1991) 53 Cal.3d 771, 805; People v. Bonin, supra, 46 Cal.3d 659, 672-673.)

3/ After entering a plea of not guilty on August 2, 1982, defendant on September 14, 1982, moved for a change of venue, which motion was denied summarily on September 23, 1982, on the ground the motion did not comply with California Rules of Court, rule 841. On October 8, 1982, defendant filed a second motion to change venue, which the court considered and denied on October 20, 1982. On December 7, 1982, defendant renewed his motion for change of venue, which was heard and denied on that date.

"On appeal after a judgment following the denial of a change of venue, the defendant must show both that the court erred in denying the change of venue motion, i.e., that at the time of the motion it was reasonably likely that a fair trial could not be had, and that the error was prejudicial, i.e., that it [is] reasonably likely that a fair trial was not in fact had. [Citations.]" (People v. Edwards, supra, 54 Cal.3d 787, 807, italics added; People v. Cooper, supra, 53 Cal.3d 771, 805-806.)

With regard to the first part of the showing required of a defendant on appeal, we employ a standard of de novo review to the trial court's ultimate determination of the reasonable likelihood of an unfair trial. (People v. Edwards, supra, 54 Cal.3d 787, 807; People v. Cooper, supra, 53 Cal.3d 771, 805-806; People v. Bonin, supra, 46 Cal.3d 659, 676-677.) This requires our independent determination of the weight of the five controlling factors described above. (People v. Bonin, supra, 46 Cal.3d 659, 676-677; People v. Balderas (1985) 41 Cal.3d 144, 177.) With regard to the second part of the showing, in order to determine whether pretrial publicity had a prejudicial effect on the jury, we also examine the voir dire of the jurors. (People v. Howard (1992) 1 Cal.4th 1132, 1167; People v. Anderson (1987) 43 Cal.3d 1104, 1131; People v. Balderas, supra, 41 Cal.3d 144, 177.)

Although defendant was charged with very serious offenses, every capital case presents a serious charge. This factor adds weight to a motion for change of venue but is not dispositive. (People v. Howard, supra, 1 Cal.4th 1132, 1167; People v. Cooper, supra, 53 Cal.3d 771, 806; People v. Balderas, supra, 41 Cal.3d 144, 177.) The nature of the acts committed upon the victim is a factor that would tend to support a change of venue, but not to the degree of a case involving serial murders, for example. (Compare People v. Jennings (1991) 53 Cal.3d 334, 360.)

Defendant urges that the second factor, the nature and extent of pretrial publicity, virtually compelled a change of venue. In support of his renewed motion, defendant produced copies of articles appearing in two newspapers (six in the Inter-Mountain News, and approximately twenty in the Redding Record Searchlight, between April 1982 and August 1982) and more than sixty copy-notes from local television or radio broadcasts which aired during the same period. Many of these news reports detailed the condition in which Mrs. Stendal's body was found and the circumstances of her death; several included the circumstance that defendant's palm print had been found at the murder scene, and several reported that the prosecutor intended to seek the death penalty because of the heinous nature of the crime.

The defense also produced the results of a telephone public-opinion survey conducted on September 21 and 22, 1982.

The survey revealed that of 169 persons contacted, 136 (or 80 percent of those contacted) had heard of the case; 94 (or 55 percent of those contacted) had heard of an arrest having been made; 52 (or 31 percent of those contacted) had formed an opinion as to defendant's guilt, and (of those 52) 38 persons (or 70 percent) had formed their opinion from reading the Record Searchlight and 5 other persons had formed their opinion from reading the Inter-Mountain News.

Defendant urges that the results of the survey compelled a change of venue. The degree of exposure indicated by the survey, however, was not greater than in other cases in which a change of venue has not been required. (See, e.g., People v. Jennings, supra, 53 Cal.3d 334, 359, 361 [72 percent recalled the offenses and 31 percent believed there was a very strong case against the defendant]; People v. Coleman (1989) 48 Cal.3d 112, 135 [46.3 percent recalled the crime and 31.4 percent believed the defendant was probably or definitely guilty].)

An additional consideration is that the impact of the publicity may be mitigated due to the lapse of time between publication or issuance of news reports and commencement of jury selection. (E.g., People v. Jennings, supra, 53 Cal.3d 334, 361 [publicity eleven months prior to trial did not require change of venue]; People v. Anderson, supra, 43 Cal.3d 1104, 1130 [danger of prejudice significantly reduced with lapse of five months]; People v. Welch (1972) 8

Cal.3d 106, 113-114 [news reports ending just over one month prior to trial did not require venue change].) Passage of time weighs against a change of venue. (People v. Edwards, supra, 54 Cal.3d 787, 808.)

In the present case, the lapse of nearly three months between the issuance of the last report on August 17, 1982, and the commencement of jury selection on November 10, 1982, helped dispel the potentially prejudicial effect of the news reports of the killing. Although the extent and content of the pretrial publicity indicates a potential for prejudice, the circumstances that the reports had abated in the months preceding the trial, and that trial was held in Redding (35 miles from Burney), a larger community not the locus of the crime, lead us to conclude that a change of venue based upon pretrial publicity was not strongly indicated.

The next factor to be considered is the size of the community. "'The larger the local population, the more likely it is that preconceptions about the case have not become imbedded in the public consciousness.' [Citation.]" (People v. Jennings, supra, 53 Cal.3d 334, 363.) The size of the county by itself is not determinative; rather, the critical factor is whether it can be shown that the size of the population is large enough to neutralize or dilute the impact of adverse publicity. (Ibid.)

Defendant's trial took place in late 1982. Shasta County, which encompasses 3,850.2 square miles (State of Cal.,

Cal. Statistical Abstract (1984) table A-1, p. 2), then had a population of approximately 122,100, ranking it 28th out of 58 counties in the state (State of Cal., Cal. Statistical Abstract, supra, table B-3, p. 15). As defendant has pointed out, cases involving counties with populations of similar size more frequently have occasioned venue changes than cases involving more populous counties. (See People v. Balderas, supra, 41 Cal.3d 144, 178-179.) We do not agree with the suggestion, however, that every case involving the death penalty merits a change of venue if it arises in a county of this size. Therefore, although this factor weighs somewhat in favor of a change of venue, it is not determinative.

The fourth and fifth factors are the respective status and prominence of the defendant and his victim. In the town of Burney, Mrs. Stendal was a well-known and apparently well-liked active participant in the community, had 20 years' experience in the Burney school system, and was described as having "taught everyone's kids." It does not appear that she had any particular prominence or status in the greater-county area outside the small, isolated town (Burney then had a population of approximately 3,000) in which she lived. Defendant also was a long time resident of Burney, whose ties to the community were interrupted only by the fairly brief periods he spent at California Youth Authority facilities. Although he previously had been convicted of several

nonviolent felony offenses, and news accounts after the murder reported his prior confinement at the California Youth Authority on a burglary commitment, he was by no means a stranger to, or friendless in, the community (see People v. Balderas, supra, 41 Cal.3d 144, 179), and the degree of his prior criminal involvement does not appear to have earned him any great notoriety even in the small community of Burney. Although the respective positions of the victim and defendant within the community might lend support for a change of venue, this factor does not weigh heavily in favor of a change of venue.

Considered in total, the above described factors do not strongly weigh in favor of or against a change, but simply indicate a venue change might have been desirable. It appears that, although he established the possibility of an unfair trial in this venue, defendant failed to carry his burden of proving there was a reasonable likelihood that jurors drawn from Shasta County would have formed such fixed opinions as a result of the pretrial publicity that they could not make the required determinations with impartiality. (See People v. Bonin, supra, 46 Cal.3d 659, 678.)

Considering the relative closeness of the issue, however, we turn next to the question whether any error in the trial court's ruling -- that defendant did not carry his burden -- would be prejudicial, that is, whether the record demonstrates a reasonable likelihood he did not in fact

receive a fair trial. With this purpose in mind, we consider the jury voir dire to determine whether the jurors may have been prejudiced by the pretrial publicity surrounding the case, bearing in mind that no presumption of a deprivation of due process of law arises from juror exposure to publicity concerning the case. (People v. Daniels (1991) 52 Cal.3d 815, 853.)

In People v. Cooper, supra, 53 Cal.3d 771, prejudice was not shown where only three jurors had been exposed to "'prejudicial information'" concerning the case and on examination all the jurors had stated they could be fair. (Id., at p. 807.) In People v. Jennings, supra, 53 Cal.3d 334, prejudice was not established where voir dire of the selected jurors demonstrated they were not "tainted" by the modest pretrial publicity. (Id., at p. 363.) In People v. Bonin, supra, 46 Cal.3d 659, prejudice was not demonstrated where even though prior to trial 10 of the 12 jurors and 3 of the 4 alternates had been exposed to news coverage, most had received indirect and minimal exposure. (Id. at p. 678.) In People v. Anderson, supra, 43 Cal.3d 1104, no prejudice was found where eight of the selected jurors had no knowledge of the facts or the issues, three of the others had read little about the case, one recalled the case in general terms but in none of its details, and each juror stated he or she had formed no opinion and could and would reach a decision based on the evidence presented at trial. (Id., at p. 1131.) In

People v. Balderas, supra, 41 Cal.3d 144, no prejudice was demonstrated where six of the selected jurors professed pretrial ignorance of the case, four recalled reading reports, but none had followed the case or recalled many details. All of the selected jurors stated they could set aside any impressions obtained outside the courtroom and could consider the evidence without being prejudiced by the pretrial publicity. In People v. Welch, supra, 8 Cal.3d 106, each of the selected jurors was unfamiliar with the facts, had not formed any opinion of the defendant's guilt or innocence, or stated he or she could act fairly and impartially. (Id., at p. 114.)

In the present case, defendant points out that all but three jurors had watched on television, heard on the radio, or read in the newspapers something concerning the case. Our review of the record reveals, however, that most of those jurors had received only minimal pretrial exposure to the case, that such exposure took place during a period well before commencement of the trial, that the jurors had not been informed of the evidence linking defendant to the case but only that the murder had occurred, and that when questioned on the subject, all of these jurors attested to their ability to put aside everything they had learned about the case and to decide the issues based solely on the evidence presented at trial.

We also observe that, in renewing the motion upon completion of jury selection, defendant did not rely upon the substance of the answers actually given in voir dire to contend the jurors had formed opinions based upon pretrial publicity; defendant, in fact, acknowledged the assurances of the jurors that they would put aside any prior knowledge of the case. Rather, defendant only reiterated the point made earlier that, based on the percentage of persons answering defendant's telephone poll who indicated they had formed an opinion, it was reasonably likely some of those who actually served on the jury also had formed an opinion, no matter what their responses had been in the voir dire on this subject.

Finally, defendant urges that the circumstance that the trial court granted his motion for a change of venue prior to retrial of the penalty phase suggests the trial court belatedly recognized the true potential for prejudice. The record demonstrates, however, that upon defendant's renewal of his motion at the conclusion of the first trial of the penalty phase, the court expressly granted the motion on the ground that there had been intensive additional publicity during the entire guilt and penalty phases of the trial, which the media had attended on a daily basis, and therefore the likelihood of a fair trial in the county had diminished.

Having considered the totality of the evidence, we conclude defendant has not met his burden on appeal of

demonstrating both that it was reasonably likely he could not receive a fair trial in Shasta County absent a change of venue, and that it was reasonably likely he did not in fact receive a fair trial. Therefore, reversal is not required.

B. Sufficiency of the evidence.

1. First degree murder.

In support of the allegation of first degree murder, the prosecution proceeded upon three alternate theories: premeditation and deliberation, torture murder, and felony murder (based upon the commission of rape and burglary). According to defendant, his guilt was not proved under any of these theories.

Having reviewed the entire record in the light most favorable to the judgment and presuming the existence of every fact the trier of fact reasonably could have deduced from the evidence, we conclude that a rational trier of fact could have found beyond a reasonable doubt the essential elements of defendant's guilt under each of these theories of first degree murder. (People v. Pensinger (1991) 52 Cal.3d 1210, 1237; People v. Johnson (1980) 26 Cal.3d 557, 576.)

a. Premeditation and deliberation.

In a case, such as the present one, based upon circumstantial evidence, we must decide whether the circumstances reasonably justify the findings of the trier of fact, but our opinion that the circumstances also might reasonably be reconciled with a contrary finding would not

warrant reversal of the judgment. (People v. Perez (1992) 2 Cal.4th 1117, 1124.)

In order to ascertain whether the evidence is sufficient to sustain a finding of first degree murder based upon premeditation and deliberation, we generally examine whether there is evidence of planning, motive, or method, although these factors are not exclusive. (People v. Perez, supra, 2 Cal.4th 1117, 1125; People v. Thomas (1992) 2 Cal.4th 489, 517; People v. Raley (1992) 2 Cal.4th 870, 887; People v. Edwards, supra, 54 Cal.3d 787, 813-814.) When the record discloses evidence in all three categories, the verdict generally will be sustained. Otherwise, convictions for first degree murder typically have been upheld where there is "'either very strong evidence of planning, or some evidence of motive in conjunction with planning or a deliberate manner of killing.' [Citations.]" (People v. Raley, supra, 2 Cal.4th 870, 887.)

Our review of the record reveals evidence falling within all three categories. With respect to planning, the evidence (the unfiltered cigarette butt found near a window and a handprint on the windowsill) supports an inference defendant spent a period of time just outside Mrs. Stendal's residence observing her, before entering to commit the offenses. Once inside, defendant rendered the victim subject to his complete control by tying her hands and cutting the

telephone lines. After binding the victim, defendant had a significant period of time in which to contemplate and plan her eventual death as he engaged in various acts of torture. (See People v. Raley, supra, 2 Cal.4th 870, 887.)

Although evidence of defendant's motive is less clear, a rational trier of fact could have determined that defendant's motive in murdering Mrs. Stendal was to avoid detection for the sexual and other physical abuses he had committed against her. (See People v. Perez, supra, 2 Cal.4th 1117, 1126; People v. Raley, supra, 2 Cal.4th 870, 887; People v. Turner (1990) 50 Cal.3d 668, 688.)

Finally, the manner of killing supports a finding of premeditation. The evidence establishes that defendant sequentially strangled the victim -- first manually, and then by means of ligature -- after subjecting her to prolonged physical abuse through the infliction of various types of wounds, some of which were not random. During the infliction of these wounds, defendant could have quickly dispatched the victim by means of stabbing and beating, had he chosen to do so. These circumstances do not suggest an unreflecting explosion of violence, but rather a preconceived design to kill the victim by the particular means chosen, and to prolong her agony in the process. (People v. Edwards, supra, 54 Cal.3d 787, 814; see People v. Raley, supra, 2 Cal.4th 870, 887.) Therefore, we conclude the evidence, although circumstantial, affords an adequate foundation for an

inference of premeditation and deliberation, and is sufficient to support such a conclusion by a rational trier of fact.

b. Torture murder.

The evidence also is sufficient to support the finding that defendant killed the victim with the intent to torture her. "'Torture murder is "murder committed with a wilful, deliberate and premeditated intent to inflict extreme and prolonged pain." [Citation.]'" (People v. Raley, supra, 2 Cal.4th 870, 888, quoting People v. Pensinger, supra, 52 Cal.3d 1210, 1239.) Such intent, considered sufficiently culpable to warrant punishing the perpetrator for first degree murder, is the calculated intent to cause pain for "'"the purpose of revenge, extortion, persuasion or for any other sadistic purpose."'" (People v. Raley, supra, 2 Cal.4th 870, 888, quoting People v. Wiley (1976) 18 Cal.3d 162, 168; see also People v. Bittaker (1989) 48 Cal.3d 1046, 1101; People v. Davenport (1985) 41 Cal.3d 247, 267.) "However, there must be a causal relationship between the torturous act and death, as Penal Code section 189 defines the crime as murder 'by means of' torture. [Citation.]" (People v. Pensinger, supra, 52 Cal.3d 1210, 1239, quoting People v. Davenport, supra, 41 Cal.3d 247, 267.)

Defendant, relying upon the evidence that the numerous "drag" knife wounds across the victim's chest apparently were not inflicted for the purpose of causing death and did not cause death, asserts that no causal relationship exists between these torturous acts and Mrs. Stendal's death.

This assertion ignores the additional evidence that her death was caused by manual and ligature strangulation after she not only had been bound, beaten, and stabbed in the manner just described, but also had received a series of additional injuries (described more fully below), inflicted over her entire body. The finding of murder-by-torture encompasses the totality of the brutal acts and the circumstances which led to the victim's death. (People v. Talamantez (1985) 169 Cal. App.3d 443, 456; see also People v. St. Joseph (1990) 226 Cal.App.3d 289, 297; People v. Hindmarsh (1986) 185 Cal.App.3d 334, 349.) The acts of torture may not be segregated into their constituent elements in order to determine whether any single act by itself caused the death; rather, it is the continuum of sadistic violence that constitutes the torture. (People v. Talamantez, supra, 169 Cal.App.3d at p. 456.)

In the present case, the victim was subjected to strangulation by two different methods, her wrists were bound so tightly as to cut into her skin, she was beaten in the face severely enough to have caused her eyes to be swollen shut and her lips to be swollen, she received severe blows to other parts of her body, and she suffered repeated, incision-type stab wounds to her neck, chest, and breast area. We conclude that this evidence amply supports the finding that Mrs. Stendal's death was brought about by torture.

Defendant additionally contends the trial court erred in instructing the jury pursuant to the then-current

version of CALJIC No. 8.24,[4/] because the evidence did not establish that the torture caused the victim's death. As explained above, there was ample evidence to demonstrate that the murder was accomplished by means of torture. Thus, the trial court did not err in giving this instruction.

Although it is in the context of his challenge to the sufficiency of the evidence to support the torture-murder special-circumstance finding that defendant also questions the sufficiency of the evidence to establish the intent to torture, for the sake of convenience we review this related claim at this point in our opinion, because intent to torture also must be present in order to sustain a conviction of first degree murder on a theory of torture murder. Again relying exclusively on the evidence of "drag" marks on the victim's chest, defendant urges that the specific intent to torture may not be inferred solely from the condition of the victim's body, because even severe wounds may be as consistent with "an explosion of violence" as with torture. (People v. Mincey (1992) 2 Cal.4th 408, 432; People v. Raley, supra, 2 Cal.4th 870, 888; People v. Davenport, supra, 41 Cal.3d 247, 268.)

4/ The version of CALJIC No. 8.24 (Cal. Jury Instns., Crim. (4th ed. 1979)), as read to the jury, provided in pertinent part: "The essential elements of [torture] murder are one, the act or acts which caused the death must involve a high degree of probability of death, and two, the defendant must commit such act or acts with the intent to cause cruel pain and suffering for the purpose of revenge, extor[t]ion, persua[s]ion or for any sadistic purpose."

Intent is a state of mind which, unless established by the defendant's own statements, must be proved by the circumstances surrounding the commission of the offense (People v. Mincey, supra, 2 Cal.4th 408, 433; see also People v. Pensinger, supra, 52 Cal.3d 1210, 1239), which include the severity of the victim's wounds. (People v. Mincey, supra, 2 Cal.4th 408, 433.)

In the present case, the coroner testified that many of the victim's wounds, particularly the knife "drag" marks, were inflicted while she still was alive but after she had been rendered incapable of avoiding further attack. The wounds revealed that a relatively slow, methodical approach had been employed in their infliction, rather than their having resulted from sudden, explosive violence. The nature of many of the wounds, including the repeated blows to the face and to other parts of the body, as well as the knife "drag" marks, suggests that they were administered over a substantial period of time and that defendant intended to inflict cruel pain and suffering on the victim. Considered with the circumstances that the victim was isolated and prevented from resisting or escaping during these acts, this evidence establishes defendant's intent to torture the victim.

c. Felony murder.

The evidence also is sufficient to support a finding of first degree murder based upon the theory of felony murder, whether the underlying felony is considered to be rape or

burglary. "We have required as part of the felony-murder doctrine that the jury find the perpetrator had the specific intent to commit one of the enumerated felonies, even where that felony is a crime such as rape. [Citations.]" (People v. Hernandez (1988) 47 Cal.3d 315, 346.) It also is established that the killing need not occur in the midst of the commission of the felony, so long as that felony is not merely incidental to, or an afterthought to, the killing. (Id., at p. 348; see People v. Hayes (1990) 52 Cal.3d 577, 631.)

Defendant urges that the only items of evidence linking him to the commission of the rape are the unfiltered cigarette butt found near the residence, his presence in the residence on the night in question, and certain marks on his legs which an expert opined were similar to marks seen on other perpetrators of sexual assaults. Defendant ignores the additional circumstantial evidence that a short time prior to the commission of the present offenses, he participated in making telephone calls of a harassing nature to various persons and was present when his companion made a call of a sexual nature to the murder victim. On the evening the offenses were committed, defendant informed one witness that he was going to pick up a woman, and another that he was going to "get a piece of butt." The evidence that Mrs. Stendal was forcibly raped, prior to her death, was uncontradicted. This evidence, considered with the circumstances that the victim

was tied in a manner consistent with defendant's formal education in the art of trucker's-knots, that the abrasions below defendant's knees and above his right knee were incurred by defendant while his legs were unclothed, and that these abrasions were consistent with injuries observed in other cases of sexual assault, amply support the jury's implied finding that defendant specifically intended to commit rape and that the rape was not a mere incident of the murder.

Defendant also urges there is insufficient evidence to support a finding of felony murder based upon the underlying felony of burglary because there is no evidence demonstrating he entered the residence with the requisite felonious intent (§ 459), in this case the intent to commit rape. Such intent usually must be inferred from all the facts and circumstances revealed by the evidence, because only rarely can it be proved directly. (People v. Matson (1974) 13 Cal.3d 35, 41.) In view of (1) the previously described evidence of defendant's conduct in the hours preceding his entry of the Stendal residence, (2) the evidence he spent a period of time immediately outside the residence, presumably contemplating his next act, and (3) the methodical manner in which defendant isolated the victim and committed the rape, the nonsexual physical abuse, and finally the murder itself, it is clear that a rational trier of fact could conclude defendant had the requisite felonious intent prior to his entry into the residence.

C. Special circumstances issues.

1. Torture-murder special circumstance.5/

Defendant contends the trial court erred in failing to instruct the jury that in order to find the special circumstance charged under section 190.2, subdivision (a)(18) (murder involving torture), to be true, it had to determine that defendant possessed the intent to torture Mrs. Stendal. (People v. Davenport, supra, 41 Cal.3d 247, 271.) The jury in defendant's case was instructed that in order to find the torture-murder special circumstance true, it must be proved: "1. That the murder was intentional, and [¶] 2. That the murder involved the infliction of torture. [¶] To prove the infliction of torture, the infliction of extreme physical pain must be proved no matter how long its duration. [¶] Awareness of pain by the deceased is not a necessary element of torture." (CALJIC No. 8.81.18 (4th ed. 1979).)

Although this instruction did not specifically inform the jury that the concept "infliction of torture" included an "intent to torture," nothing in the instruction was inconsistent with that understanding of the concept. Similarly to the juries in People v. Mincey, supra, 2 Cal.4th

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5/ As previously noted, we have discussed defendant's attack on the sufficiency of the evidence of the torture-murder special circumstance, specifically that the evidence was insufficient to establish intent to torture, in resolving defendant's related claim that the evidence was insufficient to sustain his conviction of first degree murder on a theory of torture murder. (See ante, pp. ___-___ [typed maj. opn. at pp. 30-31].)

408, 455, and People v. Wade (1988) 44 Cal.3d 975, 994, the present jury was instructed at the guilt phase both as to first degree torture murder and as to the torture-murder special circumstance. The first degree torture murder instruction specifically informed the jury that an "intent to cause cruel pain and suffering" (CALJIC No. 8.24 (4th ed. 1979)) was a required element of the offense. As in Wade, "nothing in the present record suggests the jury in this case was likely to have drawn any . . . distinction in the use of the term 'torture' in the two instructions." (44 Cal.3d at p. 994.) Also, as in Wade, "neither the prosecutor nor defense counsel suggested at any point that a torture-murder special circumstance could be established without first proving an intent to torture." (Id., at pp. 994-995.)

To be sure, as in People v. Pensinger, supra, 52 Cal.3d 1210, 1254-1255, and People v. Wade, supra, 44 Cal.App.3d 975, 990, the jury was instructed on multiple theories of first degree murder, and therefore the intent to torture may not be established on the mere basis of the guilt verdict on the first degree murder charge. In People v. Pensinger, supra, 52 Cal.3d 1210, we reversed the special circumstance finding because, in addition, neither the prosecutor nor defense counsel discussed the issue whether the defendant had intended to torture the victim, either in the context of the murder-by-torture theory of first degree murder or the torture-murder special circumstance. (Id., at p. 1255.)

In the present case, by contrast, the prosecutor in closing argument repeatedly stressed that defendant's intent was to cause cruel pain. For example, the prosecutor asserted: "He wanted to murder her but he wanted her to die slowly and he wanted her to feel her death." Defense counsel also repeated the instruction on intent to torture. Finally, in rebuttal, the prosecutor reiterated that the prosecution's evidence had demonstrated the intent to torture and also the intent to kill the victim. In further contrast to People v. Pensinger, supra, 52 Cal.3d 1210, 1255, there was overwhelming evidence of intent to torture, as described above. In light of the various instructions and the entire trial record, we conclude there is no reasonable likelihood that the jury understood the torture-murder special-circumstance instruction as not requiring a finding of intent to torture. (People v. Mincey, supra, 2 Cal.4th 408, 455; see Estelle v. McGuire (1991) 502 U.S. __,__ [116 L.Ed.2d 385, 399, 112 S.Ct. 475, 482]; People v. Kelly (1992) 1 Cal.4th 495, 525.)

Defendant's claim that the evidence is insufficient to support the finding of a torture-murder special circumstance must be rejected. "Proof of a murder committed under the torture-murder special circumstance . . . requires proof of first degree murder (§ 190.2, subd. (a)), proof the defendant intended to kill and to torture the victim (§ 190.2, subd. (a)(18)), and the infliction of an extremely painful act upon a living victim. (Ibid.)" (People v. Davenport supra, 41

Cal.3d 247, 271.) Unlike the section 189 definition of murder by torture, section 190.2, subdivision (a)(18), requires that the defendant have acted with intent to kill. (41 Cal.3d at p. 271.)

As discussed in detail above, there was ample evidence to support the jury's finding of first degree murder, and to establish that defendant intended to torture his victim, did so while she still was alive, and intended to kill her.

2. Felony-murder special circumstances.

Defendant contends the trial court erred in failing to instruct the jury that in order to find the special circumstances charged under section 190.2, subdivision (a)(17)(iii) (rape) and (vii) (burglary), to be true, it had to determine that defendant possessed the intent to kill Mrs. Stendal. Subsequent to the trial in this case, such an instruction was required by this court's decision in Carlos v. Superior Court (1983) 35 Cal.3d 131, 142. Defendant also contends that even had the instructions correctly reflected the intent requirement, there is insufficient evidence to support findings of intent, and that these two special circumstance findings therefore must be set aside.

Defendant's claims are rendered moot by this court's intervening decision in People v. Anderson, supra, 43 Cal.3d 1104, 1147, which expressly overruled Carlos on this point. In Anderson, we held that "intent to kill is not an element of the felony-murder special circumstance; but when the defendant

is an aider and abettor rather than the actual killer, intent must be proved." (Ibid.) The rule enunciated in Anderson applies both to crimes committed after the Anderson decision and to crimes committed prior to the Carlos decision. (People v. Hamilton (1988) 46 Cal.3d 123, 143, fn. 5; People v. Easter (1987) 197 Cal.App.3d 183, 185-187; see People v. Ramirez (1990) 50 Cal.3d 1158, 1182-1183.) The offenses in this case were committed prior to Carlos.

In the present case, the evidence was susceptible of only two reasonable interpretations -- that defendant was the actual killer or that he was not at all involved in the crime; there was no evidence he participated only as an aider and abetter. Accordingly, intent to kill was not an element of the felony-murder special circumstances charged against defendant, and the trial court was not required to instruct on such intent as an element of the alleged special circumstances. (People v. Hamilton, supra, 46 Cal.3d 123, 142-143; People v. Easter, supra, 197 Cal.App.3d 183, 185.) Although the issue whether there was sufficient evidence to support a finding that defendant possessed the intent to kill therefore is moot in the context of defendant's present contention, we have concluded (as described above) that the evidence is sufficient to establish defendant's intent to kill.

In the present case, because defendant was guilty of murder in the perpetration of the rape, the rape-murder special circumstance properly was found to have been proved if

it was established that defendant intended to commit rape, and the rape and the killing were part of one continuous transaction. (See People v. Hayes, supra, 52 Cal.3d 577, 631-632; People v. Hernandez, supra, 47 Cal.3d 315, 348.) As is amply demonstrated by the evidence, a rational trier of fact could have found that defendant possessed the specific intent to commit rape, and that the rape was not merely incidental to the killing, but part of a continuous course of violence against the victim, culminating in her murder.

The same rule applies with regard to the finding of the burglary-murder special circumstance. (People v. Hayes, supra, 52 Cal.3d 577, 632; see People v. Hernandez, supra, 47 Cal.3d 315, 348.) A rational trier of fact properly could have found both that defendant intended to commit burglary, and that the burglary of the residence and the eventual killing were part of one continuous transaction. (See People v. Hayes, supra, 52 Cal.3d 577, 632.)

D. Jury deliberations.

1. Substitution of a juror.

The jury retired to deliberate at 3:40 p.m. on December 15, 1982, recessing for the day after less than one hour of deliberations. The following morning, before further deliberations, the court announced that one of the jurors had become ill, and both parties stipulated to his replacement by an alternate juror. After the alternate was sworn, the trial judge advised the jury to resume its deliberations, stating it

"would be helpful and in connection with commencing your deliberations again, that you kind of start, start from scratch, so to speak, so that Mr. Rhoades has the benefit of your thinking as well as give him an opportunity for his input also." The jury deliberated two and one-half days after substitution of the alternate juror before returning its verdict.

Defendant contends the court's admonition did not embody all elements of the instruction required by People v. Collins (1976) 17 Cal.3d 687. In Collins, this court directed that "the court instruct the jury to set aside and disregard all past deliberations and begin deliberating anew. The jury should be further advised that one of its members has been discharged and replaced with an alternate juror as provided by law; that the law grants to the People and to the defendant the right to a verdict reached only after full participation of the 12 jurors who ultimately return a verdict; that this right may only be assured if the jury begins deliberations again from the beginning; and that each remaining original juror must set aside and disregard the earlier deliberations as if they had not been had." (Id., at p. 694; see also People v. Anderson (1990) 52 Cal.3d 453, 482-483.)

Defendant's contention must be rejected. By instructing the jury to "kind of start, start from scratch, so to speak," the court implied that the jury should disregard its previous deliberations. (People v. Odle (1988) 45 Cal.3d

386, 405.) By providing this directive in the context of advising the jurors to give the alternate the benefit of the other jurors' thoughts, as well as to give the jurors the benefit of the alternate's input, the court further emphasized that deliberations were to begin anew with the full participation of the alternate. Furthermore, the court did not suggest that the jury might not have to reconsider any matter already considered or decided. (Compare People v. Odle, supra, 45 Cal.3d 386, 405 [court's comments erroneously implied that the alternate should be brought "up to speed" on matters already discussed and possibly decided].)

Finally, even assuming the court erred, no prejudice occurred. In determining whether Collins error was prejudicial, we may consider whether the case is a close one and compare the time the jury spent deliberating before and after the substitution of the alternate juror. (People v. Odle, supra, 45 Cal.3d 386, 405; Griesel v. Dart Industries, Inc. (1979) 23 Cal.3d 578, 585.) In People v. Odle, supra, 45 Cal.3d 386, we concluded there was no prejudice where the case against the defendant was overwhelming and where the jury deliberated only part of one afternoon prior to substitution of the alternate juror and two and one-half days thereafter. (Id., at p. 406.) In People v. Collins, supra, 17 Cal.3d 687, itself, we determined the error was not prejudicial where the case against the defendant was very strong, and the jury had deliberated little more than one hour prior to substitution of

the alternate and had returned a verdict after several additional hours. (Id., at pp. 690, 697.)

In the present case, the evidence against defendant was extremely strong. The jury had deliberated less than one hour prior to substitution of the alternate, and continued to deliberate for two and one-half days thereafter. It is not reasonably probable the outcome of the trial would have been different had the jury been instructed, in more exact language, to begin its deliberations anew. (See People v. Collins, supra, 17 Cal.3d 687, 697; People v. Watson (1956) 46 Cal.2d 818, 836.)

2. The trial court's comments on the jury's numerical division.

At 4 p.m. on Thursday, December 16, 1982, the first full day of deliberations, the jury conveyed a message to the court that the jury had reached an impasse and was requesting guidance as to how to proceed. The court, stating it had received the jury's message, requested that the jury foreman inform the court as to the numerical division of the jurors, without revealing the respective numbers for a guilty verdict or a not guilty verdict.6/

6/ The record of the exchange is as follows:
"THE COURT: All right, we have our jurors back in the box. Mr. Forrester, I received your message as to a numerical count. However, to properly appreciate your message, I'm going to have to ask you a few questions, all right?
"THE FOREMAN: Okay.
"THE COURT: Have the jurors voted on the first count, that would be the issue of murder?
"THE FOREMAN: Uh-huh.
"THE COURT: Without telling me which way that numeral [sic] count is, would you tell me what the numerical count
(Footnote continued on next page.)

Defendant contends the court's inquiry into the jury's numerical division impaired the fairness of the trial. "[T]he practice of inquiring into the jury's numerical division, without finding out how many are for conviction and how many for acquittal, was expressly approved in [People v.] Carter [(1968) 68 Cal.2d 810, 815]." (People v. Rodriguez (1986) 42 Cal.3d 730, 776.) Such inquiry is justified in the discharge of the court's "statutory responsibility of assuring that a verdict is rendered 'unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree.' (Pen. Code, § 1140.)" (People v. Carter (1968) 68 Cal.2d 810, 815.)

Although, as defendant points out, the rule is otherwise in federal court (see Brasfield v. United States

(Footnote continued from previous page.)
is. Don't tell me which way, but what is the numerical count?
"THE FOREMAN: Eleven to one.
"THE COURT: Eleven to one. All right, now, have the jurors taken a vote on the Count II, the rape charge?
"THE FOREMAN: No, we haven't.
"THE COURT: Have the jurors taken a vote as yet on Count III, the burglary charge?
"THE FOREMAN: No, we haven't.
"THE COURT: All right, now in connection with the -- well, I think with that information presented to the Court that it would be of importance that if at the moment -- well, let me ask you this. Where do you think you are at the moment as far as the numerical count on the eleven to one on the first charge, the count of murder? Do you think that further consideration --
"THE FOREMAN: Yeah, we just -- we're kind of at a standstill."
At this point the court, indicating that it was not unusual in a case of this nature for jurors to deliberate longer than a single day, recessed the jury until the following day.

(1926) 272 U.S. 448 [71 L.Ed. 345, 47 S.Ct. 135]), we previously have explained that this federal rule is not binding on the states. (People v. Rodriguez, supra, 42 Cal.3d 730, 776, fn. 14.)7/ In view of the circumstance that the court inquired in a neutral manner as to the numerical count in order to determine whether further deliberations would be productive, we decline to disapprove the practice as it was employed in the present case.

We also disagree with defendant's contention that the court's order declaring a recess until the following morning, once it had ascertained the vote was split, implied the court had found "something wrong" with the vote which might be remedied by a night's rest. The determination, pursuant to section 1140, whether there is a "'reasonable probability'" of agreement, rests within the sound discretion of the trial court. (People v. Miller (1990) 50 Cal.3d 954, 994.) Although the court must take care to exercise its power without coercing the jury into abdicating its independent judgment in favor of considerations of compromise and expediency (ibid.), the court may direct further deliberations upon its reasonable conclusion that such direction would be perceived "'as a means of enabling the jurors to enhance their

7/ In his supplemental brief, defendant urges that we reconsider the California practice permitting such inquiry, but he also acknowledges we have rejected similar requests in other recent cases. (See, e.g., People v. Price (1991) 1 Cal.4th 324, 467; People v. Breaux (1991) 1 Cal.4th 281, 319.) We discern no reason, based upon the circumstances of the present case, to reconsider this issue.

understanding of the case rather than as mere pressure to reach a verdict on the basis of matters already discussed and considered.' [Citation.]" (Ibid.) Nothing in the trial court's comment in the present case properly may be construed as an attempt to pressure the jury to reach a verdict; the court correctly concluded there was a reasonable probability the jurors could agree on a verdict.

3. The trial court's comments on defendant's testimony.

The jury continued its deliberations on Friday, December 17, 1982, at one point requesting that the instructions be reread. At 4:20 p.m. that day, the court was informed that one of the jurors sought to disqualify herself on the ground she was "the one," that is, the person not in agreement with the other eleven. After explaining that this circumstance afforded no basis for disqualification, the trial judge commented on the complexity of the case and the relatively brief period the jury had deliberated, reread the instruction as to defendant's entitlement to the individual opinion of each juror, and, noting the lateness of the hour, recessed the deliberations of the jury.

Prior to the resumption of jury deliberations on Monday morning, December 20, the court delivered the following comments:

"Ladies and gentlemen of the jury and the alternates, for the purpose of assisting you in deciding this

case, I am permitted by the Constitution of California to comment on the issues, the evidence and the testimony and credibility of any witness. And it occurred to me that before you retired to continue your deliberations this morning that some comment along those lines might be of some assistance to you.

"Now, you should keep in mind that my comments are intended to be advisory only, and are not binding on you, as you are the exclusive judges of the questions of fact submitted to you and of the credibility of the witnesses. You should disregard any or all of the comments, if you do not agree, if they do not agree with your views of the evidence and the credibility of the witnesses."

After outlining the difference between lawful and unlawful killing, the court stated there was no question in this case but that the killing of the victim was unlawful. The court then indicated the issues before the jury were whether the prosecution had proved beyond a reasonable doubt that defendant was legally responsible for the killing, and if so, in what degree, and if in the first degree, whether the prosecution had proved the special circumstances. The court also stated the jury must determine whether the prosecutor had proved the rape and burglary charges beyond a reasonable doubt.

The court continued: "Now, in that connection, there have been several statements attributed to the defendant out of court concerning his whereabouts and activities on the

night of April the 21st and the early morning hours of April the 22nd. These statements attributed to him are inconsistent with one another and are also inconsistent with his testimony here in court concerning his activities that evening and in the early morning hours of April the 22nd.

"Now, the district attorney has placed him in the house of Bonita Bergh Stendal through three palm prints; one bloody right palm print, which I think Mr. Collins testified to, was created by blood being on the palm first and then transferred to the booklet. In addition to that, Mr. Collins has testified there were two dry palm prints. By that, they were latent, there was a left palm print, which was latent, by that it had a chemical, had to be applied to one of the booklets to raise that palm print to where it could be seen. And another dry palm print of the right palm. Again, one that could only be seen after being treated with chemicals, and that was on a different booklet.

"Now, the defendant has testified and given you an explanation as to what he did in that house that morning which explains the presence of the bloody palm print, but does not explain the presence of the two dry or latent palm prints. Under those circumstances, I have difficulty in believing the testimony of the defendant. Now, again, my comments are intended to be advisory only and are not binding on you as you are the exclusive judges of the questions of fact submitted to you and of the credibility of the witnesses. You should

disregard any or all of the comments that I've made if they do not agree with your views of the evidence and the credibility of the witnesses."

The jury then commenced its deliberations for that day. After recessing for lunch and reconvening at 2:55 p.m., it informed the court it had reached a verdict. Prior to the seating of the jury, defendant's counsel stated he had an objection to the court's comments. The court admonished counsel that he should have made his objection earlier.

Defendant contends his right to due process of law was violated because he was not apprised in advance of the court's intention to comment, and that the content of the court's comments fell outside the range permitted by our decisions. We do not agree that defendant's right to due process of law was violated by the court's failure to provide advance notice of its intended comments. Although, as pointed out by defendant, the trial court was required by statute to afford advance notice of intended jury instructions, defendant has not directed our attention to any similar statutory or judicial requirement pertaining to judicial comment. In fact, because the statutory provision authorizing judicial comment is contained in the same section as that governing jury instructions (§ 1127; see § 1093, subd. (f)), and the Legislature while expressly providing that courts are to afford notice of jury instructions (§ 1093.5) has declined to impose such a requirement in the case of judicial comment, we

may presume no such requirement was intended by the Legislature as to the latter subject. Defendant relies primarily on People v. Rodriguez, supra, 42 Cal.3d 730, in which the trial court provided the parties with advance notice of its intended comments, and indeed, numerous drafts of the comments ultimately made in that case were prepared by the prosecutor and discussed at length by court and counsel in advance. (Id., at p. 774, fn. 13.) Although it would be better practice to afford counsel advance notice, we decline defendant's suggestion that we elevate our recitation of the particular procedural aspects of the Rodriguez case to the status of a legal requirement.

Next, defendant challenges the substance of the trial court's comments. Article VI, section 10, of the California Constitution permits the court to "make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the cause." (Italics added.) The purpose of this provision is to allow the court "to utilize its experience and training in analyzing evidence to assist the jury in reaching a just verdict. [Citations.]" (People v. Cook (1983) 33 Cal.3d 400, 407.) In People v. Rodriguez, supra, 42 Cal.3d 730, 765-770, we overruled that portion of People v. Cook, supra, 33 Cal.3d 400, 413, which held that a trial court may not make any comment on the evidence once the jury has announced it has reached an impasse in deliberations,

and concluded that although a trial court may not directly express an opinion on the ultimate issue of guilt or innocence of the accused at any stage of the trial, it is not prohibited from appropriate comment simply because the jury has indicated an initial deadlock in its deliberations. (People v. Rodriguez, supra, 42 Cal.3d at pp. 769-770; see People v. Melton (1988) 44 Cal.3d 713, 735.)

In generally summarizing the permissible contours of constitutionally authorized judicial comment, we observed in People v. Rodriguez, supra, 42 Cal.3d 730, that "the decisions admonish that judicial comment on the evidence must be accurate, temperate, nonargumentative, and scrupulously fair. The trial court may not, in the guise of privileged comment, withdraw material evidence from the jury's consideration, distort the record, expressly or impliedly direct a verdict, or otherwise usurp the jury's ultimate factfinding power. [Citations.]" (Id., at p. 766; People v. Gates (1987) 43 Cal.3d 1168, 1207.)

In People v. Rodriguez, supra, 42 Cal.3d 730, we also noted that a trial court has "broad latitude in fair commentary, so long as it does not effectively control the verdict. For example, it is settled that the court need not confine itself to neutral, bland, and colorless summaries, but may focus critically on particular evidence, expressing views about its persuasiveness. [Citations.]" (Id., at 768, italics added.) Therefore, the circumstance that in the

present case, the trial court chose to single out for particular emphasis the evidence concerning the presence of defendant's fingerprints at the crime scene, and defendant's inconsistent testimony, did not render its comments improper. As noted in Rodriguez, "'[A] judge may restrict his comments to portions of the evidence or to the credibility of a single witness and need not sum up all the testimony, both favorable and unfavorable. [Citations.]'" (Id., at p. 773, italics added.)

In the present case, the trial court essentially observed that defendant had made inconsistent statements concerning his whereabouts during the pertinent period, and that defendant's testimony as to his presence in the residence, while explaining the presence of the bloody palm print, did not explain the presence of the two dry or latent palm prints, causing the trial court to entertain doubts as to defendant's credibility. The trial court did not inaccurately state or distort any testimony (People v. Rodriguez, supra, 42 Cal.3d 730, 766, 769; People v. Cook, supra, 33 Cal.3d 400, 408), and its comment that defendant's testimony "explains the presence of the bloody palm print" permitted an inference more helpful to defendant than the jury might have drawn in the absence of the comment. Although the court commented upon defendant's credibility in a specific context, it did not comment on defendant's guilt or innocence, nor did it direct

that the jury reach a given verdict.[8/] Moreover, both prior to and after its comments, the court admonished the jury that it was free to disregard those comments. We conclude that the trial court's remarks fell within the scope of the constitutional privilege.

II. PENALTY-PHASE ISSUES

A. Alleged prosecutorial misconduct.

Defendant asserts the prosecutor committed misconduct in closing argument, when he stated the following: "[C]ircumstantial evidence is the best evidence in the world, if the circumstantial evidence is good enough. [¶] And in

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8/ The present case is clearly distinguishable from People v. Flores (1971) 17 Cal.App.3d 579, 588, in which the appellate court reversed the defendant's conviction for possession of heroin, based upon the trial court's comments on the evidence. In that case, the sole prosecution witness, a police officer, testified he saw the defendant throw away a packet of heroin, and the defendant testified he did not do so. Upon learning that the jury's vote was divided five to seven, the court told the jury that in its opinion it was a very simple, straightforward case, that the court perhaps had heard more evidence than the jury had because the court had "been in this business for some period of time," that it was really a question who was telling the truth, that if the jury believed the officer who testified he saw the defendant throw the packet of heroin away, it must believe the defendant guilty, that defendant's explanation of his behavior in the presence of the officer was not credible, that the defendant had a motive to lie whereas the officer did not, that the defendant had not provided any indication why the officer had a motive to lie, and that the trial court "would not have spent two minutes in deciding this case because I would have decided that the defendant was guilty." (Id. at p. 584, fn. 2, italics omitted.)

We believe the comments made by the trial court in the present case do not begin to approach this level of intervention in the jury's decisionmaking.

this case, of course, we've got the best circumstantial evidence you're ever going to get." Defendant objects to the designation of this evidence as the "best evidence in the world," but acknowledges the jury later was correctly instructed according to CALJIC No. 2.00 (1979 rev.) that: "Both direct evidence and circumstantial evidence are acceptable as a means of proof. Neither is entitled to any greater weight than the other." Any misapprehension on the part of the jury would have been corrected by this instruction. Furthermore, because defendant did not timely object or request an admonition, any error is deemed waived on appeal. (People v. Mitcham (1992) 1 Cal.4th 1027, 1077; People v. Hendricks (1988) 44 Cal.3d 635, 650.) Defendant's claim that the prosecutor's statement constituted an improper expression of his personal belief concerning this evidence must be rejected on the same ground.

Defendant next asserts the prosecutor's argument violated the rule in People v. Davenport, supra, 41 Cal.3d 247, 288-290, by representing that the absence of the following circumstances in mitigation constituted factors in aggravation under section 190.3: any mental or emotional disturbance on the part of defendant (factor (d)), the victim's participation in or consent to the homicidal act (factor (e)), and any circumstances causing defendant reasonably to believe in moral justification for his conduct (factor (f)). Although in Davenport we admonished that such

argument should not be permitted "in the future" (id., at p. 290), we nevertheless have applied the rule to cases tried, as was the present case, prior to Davenport. (People v. Beardslee (1991) 53 Cal.3d 68, 112.)

We observe, as we have in the past, that defendant's failure to object to the challenged remarks precludes a claim of prosecutorial misconduct. (People v. Visciotti (1992) 2 Cal.4th 1, 79; People v. Gallego (1990) 52 Cal.3d 115, 200; People v. Rodriguez, supra, 42 Cal.3d 730, 790.) Even assuming, as defendant has urged in his supplemental brief, that Davenport error served to exacerbate so-called "Brown" error (People v. Brown (1985) 40 Cal.3d 512 (revd. on other grounds in California v. Brown (1987) 479 U.S. 538 [93 L.Ed.2d 934, 107 S.Ct. 837]); see discussion, post), entitling defendant to review of his claim of error despite his failure to object (People v. Edelbacher (1989) 47 Cal.3d 983, 1035, fn. 16), there is no reasonable possibility the prosecutor's argument could have prejudiced the jury's sentencing decision. First, in view of the instructions on aggravating and mitigating factors described more fully below, there is no reasonable likelihood the jury would have been misled by the prosecutor's comments concerning the nature of the weighing process. (People v. Clair (1992) 2 Cal.4th 629, 662-663.) Second, the jury was instructed to consider the enumerated factors only "if applicable," allowing the jury to assign whatever weight was appropriate to each particular factor.

(People v. Gallego, supra, 52 Cal.3d 115, 200; People v. Brown (1988) 46 Cal.3d 432, 454-456.) In light of the nature of the aggravating evidence that properly was introduced, we conclude it is not reasonably possible that any mischaracterization by the prosecutor could have influenced the sentencing decision of a reasonable jury. (Id., at p. 456.)

Defendant also complains the prosecutor impermissibly offered as a factor in aggravation the nonstatutory ground that defendant showed "absolutely no remorse."[9/] Where a prosecutor does not suggest that a defendant's lack of remorse should be considered a factor in aggravation, he or she properly may comment on the lack of remorse. (People v. Gallego, supra, 52 Cal.3d 115, 197; People v. Carrera (1989) 49 Cal.3d 291, 339; see People v. Sully (1991) 53 Cal.3d 1195, 1249.)

The record discloses that defendant's objection to the prosecutor's remark was sustained. The trial court denied defense counsel's request for an additional curative instruction on the basis that the prosecutor had not claimed

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9/ The prosecutor's comment in context is as follows: "And let me suggest that in this case, there is no basis for sympathy for William Proctor. This is what he does on April 21st, 1982. That's what he does on April 21st. On April 22nd, what's he do? He shows absolutely no remorse." After the court sustained the defense objection, the prosecutor continued: "What does he do on the 22nd? He goes about his business like nothing happened. He goes to Redding. He goes with Bob Manley. And they go there for the purpose of having fun. [¶] The defendant spent April 22nd, 1982, having fun, less than twenty-four hours after he did that, and I submit there is no basis for sympathy for William Proctor in this case."

defendant's lack of remorse was a factor in aggravation, the court explaining it had sustained the objection because the statement constituted a conclusion.

We conclude the trial court was correct in ruling that the prosecutor had not cited lack of remorse as a factor in aggravation, although the court did err in sustaining the defense's objection that the prosecutor's statement expressed an impermissible conclusion. Thus, the trial court did not commit error in refusing defendant's request for an additional instruction or admonition.

Finally, defendant urges that the prosecutor committed prejudicial misconduct by erroneously claiming that the evidence of defendant's past demonstrated that he "is a violent person."[10/] Defendant's failure to object and request a curative instruction or admonition waives any claim he might have on appeal. (People v. Sully, supra, 53 Cal.3d 1195, 1248; People v. Rodriguez, supra, 42 Cal.3d 730, 790.)

Nonetheless, assuming defendant timely had objected, we reject defendant's claim on the merits. We conclude that

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10/ After canvassing the factors supporting imposition of the death penalty, the prosecutor commented: "Now, I submit that there is nothing that has been presented to you that would extenuate this crime. There is nothing about the defendant's background that you heard that would extenuate this crime. [¶] According to his aunt, he was a normal, average boy growing up, and his mother said that, essentially, as I recall. The only thing you know about his background is that he's had a little history of burglary, takes things that don't belong to him, and he is a violent person. That's what you know about his background. To me, that is not extenuating circumstances."

the prosecutor's remark was justifiable based on the extreme violence displayed by defendant in committing the present offenses. The prosecutor earlier had informed the jury that the circumstance of defendant's lack of any history of violence was a factor in mitigation. Although the prosecutor made the comment regarding defendant's being a violent person while discussing his background, it is apparent from the context of the entirety of the prosecutor's remarks that he was referring to defendant's conduct in the present case in characterizing defendant as a "violent person."

B. Instructional Error.

1. Instruction on aggravating and mitigating factors.

Defendant contends the court's instruction of the jury pursuant to former CALJIC No. 8.84.2 (4th ed. 1979 rev.)11/ violated his Eighth Amendment right under the

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11/ The court gave the 1979 revised version of former CALJIC No. 8.84.2, as follows: "[I]t is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed upon the defendant. [¶] After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account, and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed. [¶] If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death. However, if you determine that the mitigating circumstances outweigh the aggravating circumstances, you shall impose a sentence of confinement in the state prison for life without possibility of parole. [¶] Before you may consider a particular aggravating circumstance to be true, you must be satisfied of the existence of that aggravating circumstance beyond a reasonable doubt."

federal Constitution to a constitutionally reliable determination of penalty, because the instruction may have confused the jury concerning the nature of the process of weighing aggravating and mitigating circumstances.

In People v. Brown, supra, 40 Cal.3d 512, we upheld the constitutionality of section 190.3, while acknowledging that an instruction incorporating the mandatory language of the section "might mislead jurors as to the scope of their sentencing discretion and responsibility." (People v. Bonin, supra, 46 Cal.3d 659, 706; People v. Hamilton (1988) 45 Cal.3d 351, 370.) We expressed concern that a jury reasonably might understand the language of the instruction to define the determination of penalty as "'simply a finding of facts'" or "'a mere mechanical counting of factors on each side of the imaginary "scale."'" (Ibid.) We also expressed concern that the jury reasonably might understand the instruction to require imposition of the death penalty if the factors in aggravation outweigh those in mitigation, even where that punishment does not appear appropriate in view of all the circumstances of the case. (People v. Hamilton, supra, 45 Cal.3d at pp. 370-371; People v. Brown, supra, 40 Cal.3d at pp. 540-544.) For those cases predating Brown (such as the

present case) in which the jury was instructed in the language of section 190.3, we advised we would review each appeal on its particular merits to determine whether the jury might have been misled to the defendant's prejudice. (People v. Hamilton, supra, 45 Cal.3d 351, 371; People v. Brown, supra, 40 Cal.3d at p. 544, fn. 17.)

In the present case, with regard to the first concern expressed in Brown, supra, 40 Cal.3d 512, we observe that the jury was instructed, according to defendant's request, as follows: "In considering, taking into account, and being guided by the aggravating and mitigating circumstances, you may not decide the effect of such circumstances by the simple process of counting the number of circumstances on each side. The particular weight of such opposing circumstances is not determined by the relative number, but rather by their relative convincing force on the ultimate question of punishment." Moreover, neither the prosecutor nor defense counsel suggested the jury simply should count the factors. (See People v. Webster (1991) 54 Cal.3d 411, 451-452; People v. Howard (1988) 44 Cal.3d 375, 435-436; People v. Myers (1987) 43 Cal.3d 250, 275.) Accordingly, we conclude the jury was not misled into mechanically counting the aggravating and mitigating factors.

With regard to the second concern described in Brown, supra, 40 Cal.3d 512, defendant asserts the jury was misled because, during voir dire, the prosecutor obtained assurances from the prospective jurors that they would not have difficulty in discharging their responsibility to impose the death penalty in the event the aggravating circumstances outweighed those in mitigation, and because, during closing argument, the prosecutor emphasized the language of section 190.3. After repeating the mandatory language of the statute, the prosecutor stated: "So if you conclude that the aggravating circumstances outweigh the mitigating circumstances, you are obligated to return a verdict of death. [¶] And we spent a considerable amount of time on voir dire on this issue, and you indicated that if that was the case, that would be your verdict." In concluding his argument, the prosecutor commented that the jury had "an important, awesome responsibility," and asked them to return a death verdict "not because you want to but because under the law of California it's necessary. Thank you."

In numerous cases we have found such remarks to be harmless. For example, we have concluded that a prosecutor's argument is not misleading simply because it restates the statutory language (e.g., People v. Hamilton (1989) 48 Cal.3d 1142, 1181), describes the statutory language as mandatory (e.g., People v. Adcox (1988) 47 Cal.3d 207, 267 [prosecutor emphasized the word "shall" and advised the jury that "you

haven't any choice"]; People v. Hendricks, supra, 44 Cal.3d 635, 653-655, 662 [prosecutor emphasized the word "shall," describing it as a "term of command" with a compulsory meaning, and the process as an "automatic" one]; People v. Allen (1986) 42 Cal.3d 1222, 1279 [prosecutor argued: "'. . . Shall, not may, not might, not maybe. It is very explicit. . . .'"]), or emphasizes that the jury's decision is dictated by the law. (E.g., People v. Burton (1989) 48 Cal.3d 843, 870; People v. Grant (1988) 45 Cal.3d 829, 857.)

Moreover, in concluding, the prosecutor emphasized that the jurors had an "important, awesome responsibility." (See People v. Burton, supra, 48 Cal.3d 843, 871.) This is not a case, such as People v. Milner (1988) 45 Cal.3d 227, in which the prosecutor "assured the jurors again and again that they did not have to 'shoulder the burden of personal responsibility,' told them again and again that the law 'protects' them from deciding what is 'just and right,' and even encouraged them to 'hide' behind the law." (Id., at p. 257; see People v. Burton, supra, 48 Cal.3d 843, 872.) Nor did the prosecutor admonish the jury that the law, rather than the jury, determined the issue whether the defendant should suffer life imprisonment or death. (Cf. People v. Farmer (1989) 47 Cal.3d 888, 928.) Furthermore, taken as a whole, the prosecutor's statements concerning the mandatory aspect of

section 190.3 were a minor part of his closing argument. (See People v. Kaurish (1990) 52 Cal.3d 648, 715.)

The instructions given in this case also implied that the jury's decision as to penalty was not to be automatic or mechanical. The jury twice was informed it had the duty to decide which of the two possible punishments should be imposed, was advised to consider the evidence, the arguments of counsel, and the aggravating and mitigating factors "if applicable," and was told that if a factor was not found to be mitigating, that circumstance did not render it an aggravating factor unless the jury determined it to be aggravating beyond a reasonable doubt. At defendant's request, the jury was instructed that it was obligated to weigh the sympathetic elements of defendant's background against those which might offend the conscience, and in so doing, it could consider pity, sympathy, and mercy for defendant, but that it could not be governed by conjecture, prejudice, or public opinion. The jury also was instructed that defendant and the prosecution were entitled to the individual opinion of each juror.

Finally, the comments of defense counsel underscored the jury's discretion to decide which penalty was appropriate under the circumstances: counsel advised the jurors that each of them had an independent, singular responsibility to determine the punishment, that it was not a democratic or community effort, and that each would have to live with the

verdict. Defense counsel told the jurors to consider and weigh the factors, as they felt appropriate. (See People v. Grant, supra, 45 Cal.3d 829, 856-857; People v. Williams (1988) 44 Cal.3d 1127, 1149.) Moreover, defense counsel stressed that the most important factor, a factor in mitigation, was the absence of any violence in defendant's past, thereby underscoring the jurors' duty to consider the factors individually.

From the arguments both of the prosecutor and defense counsel, and from the instructions, the jurors would have understood that they were required to determine the appropriate penalty for defendant by weighing the enumerated factors. (People v. Burton, supra, 48 Cal.3d 843, 873.) Viewing the instructions and arguments as a whole, we are satisfied there is no reasonable likelihood that the jury was misled as to the scope of its sentencing responsibility. (People v. Clair, supra, 2 Cal.4th 629, 662-663.)[12/]

2. Instruction on consideration of multiple special circumstances.

Defendant contends the trial court failed to give an instruction on multiple special circumstances as required by

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12/ In light of this conclusion, we need not, and do not, address the continuing validity of People v. Brown, supra, 40 Cal.3d 512, in light of the United States Supreme Court's decisions in Blystone v. Pennsylvania (1990) 494 U.S. 299, 108 L.Ed.2d 255, 110 S.Ct. 1078, and Boyde v. California (1990) 494 U.S. 370, 108 L.Ed.2d 316, 110 S.Ct. 1190. (People v. Webster, supra, 54 Cal.3d 411, 452, fn. 23; People v. Cooper, supra, 53 Cal.3d 771; 845, fn. 15; People v. Gonzalez (1990) 51 Cal.3d 1179, 1231, fn. 30.)

our decision in People v. Harris (1984) 36 Cal.3d 36. In Harris, the plurality opinion stated that in a case where "overlapping" special circumstances are found to be true, the risk arises that a jury may give undue weight to the mere number of special circumstances found true. "To avoid that risk, in those cases involving a single act or an indivisible course of conduct with one principal criminal objective, the jury should be instructed that although it found several special circumstances to be true, for purposes of determining the penalty to be imposed, the multiple special circumstances should be considered as one." (Id., at p. 66, plur. opn. by Broussard, J.)

A majority of this court subsequently held to the contrary in People v. Melton, supra, 44 Cal.3d 713, 765-768. In Melton we concluded that it is constitutionally legitimate for the state to determine that a death-eligible murderer is more culpable and thus more deserving of death, if, as in the Melton case, he not only robbed the victim but committed burglary in order to facilitate commission of the robbery and murder, because these offenses involve violations of distinct interests, each of which is relevant to a determination of the seriousness of the crime. (Id., at p. 767.) The decision in Melton has been applied in subsequent cases to reject similar claims based upon Harris. (E.g., People v. Mickey (1991) 54

Cal.3d 612, 691-692; People v. Sanders (1990) 51 Cal.3d 471, 529; People v. Hernandez, supra, 47 Cal.3d 315, 357-358.) Accordingly, we reject defendant's contention.

In his supplemental brief, defendant contends that Melton also requires that the jury receive instruction that the acts providing the bases for the special circumstances (rape and burglary) may not each be weighed more than once in the penalty determination, that is, both under the circumstances of the crime and as special circumstances (pursuant to section 190.3, factor (a), and the instruction patterned thereon). (People v. Melton, supra, 44 Cal.3d 713, 768.) Although defendant urges that the trial court has a sua sponte duty to so instruct, we have indicated only that upon defendant's request, such an instruction should be given. (People v. Ashmus (1991) 54 Cal.3d 932, 997; People v. Morris (1991) 53 Cal.3d 152, 224; People v. Melton, supra, 44 Cal.3d 713, 768.)

Moreover, we have observed that in the absence of any misleading argument by the prosecutor or an event demonstrating the substantial likelihood of "double-counting," reversal is not required. (People v. Morris, supra, 53 Cal.3d 152, 224; People v. Melton, supra, 44 Cal.3d 713, 768-769.) In the present case, the prosecutor did not suggest the offenses other than murder be considered dually as special circumstances and as acts making the murder more heinous; he simply underscored the facts showing the brutality of the acts.

C. Constitutionality of section 190.3, factor (a).

Defendant challenges the constitutionality of the portion of section 190.3 that provides: "In determining the penalty, the trier of fact shall take into account . . . [as] relevant: [¶] (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance found to be true . . . ." Defendant contends the phrase, "the circumstances of the crime," is too vague to permit any meaningful distinction between those murders that warrant the death penalty and those that do not.

The United States Supreme Court itself has established that the circumstances surrounding a capital offense constitute one of the criteria upon which the jury should base its penalty determination. (See, e.g., Penry v. Lynaugh (1989) 492 U.S. 302, 318, 106 L.Ed.2d 256, 109 S.Ct. 2934; Booth v. Maryland (1987) 482 U.S. 496, 502, 96 L.Ed.2d 440, 107 S.Ct. 2529, overruled on other grounds in Payne v. Tennessee (1991) __ U.S. __, 115 L.Ed.2d 720, 111 S.Ct. 2597; Jurek v. Texas (1976) 428 U.S. 262, 304, 49 L.Ed.2d 944, 96 S.Ct. 2950 (plur. opn.). The high court has not stated or implied that the factor of the "circumstances of the offense" is unconstitutionally vague.

Defendant also contends section 190.3 is unconstitutional as applied to him because, unlike the typical

case where the same jury decides both issues of guilt and penalty, his case afforded the jurors only one opportunity to express their outrage at the offenses -- by assigning the degree of punishment -- and therefore the jury was more prone to set the maximum penalty. Nothing in the evidence, the arguments of counsel, or the instructions supports this assertion. Furthermore, because it was defendant who requested the change of venue and, by definition, the new jury, he is not in a position to claim prejudice from the granting of his motion. We also note that defendant has provided no authority for the proposition that, when a new penalty jury has been impaneled, the state may not permit the jury to determine the appropriate punishment on the basis of the same criteria that would have applied had a single jury determined both issues of guilt and penalty. Defendant has not provided any basis for us to conclude section 190.3 is unconstitutional.

D. Denial of the automatic application for modification of the verdict.

Defendant contends the court erred in denying the automatic motion to modify the verdict pursuant to section 190.4, subdivision (e). Under that section, the trial judge's "function is not to make an independent and de novo penalty determination, but rather to independently reweigh the evidence of aggravating and mitigating circumstances and then to determine whether, in the judge's independent judgment, the weight of the evidence supports the jury's verdict.

[Citations.]" (People v. Lang (1989) 49 Cal.3d 991, 1045, italics in original; People v. Edwards, supra, 54 Cal.3d 787, 846.) The trial judge must set forth his or her reasons with sufficient particularity to allow effective appellate review. (54 Cal.3d at p. 846; People v. Kelly (1990) 51 Cal.3d 931, 970.)

1. The circumstances of the crime.

Relying upon People v. Rodriguez, supra, 42 Cal.3d 730, defendant contends the trial court did not adequately specify its reasons for determining that section 190.3, factor (a) (the circumstances of the crime), amounted to an aggravating factor. In that case, we held the court's statement of reasons for denying the motion, as a whole, was insufficient "to assure thoughtful and effective appellate review," where the trial court simply stated that, having considered the arguments of counsel, all the evidence, and all the aggravating and mitigating circumstances, the aggravating factors outweighed those in mitigation and the weight of the evidence supported the jury's verdict of death. (At pp. 792-794.)

In the present case, the trial court's comments, in considering the section 190.3 factors generally and factor (a) in particular, were far more extensive and detailed. In explaining its ruling denying the automatic motion, the court commented that it had reviewed the evidence, considered the aggravating and mitigating factors, and made a determination

whether the jury's verdict (that the aggravating circumstances outweighed the mitigating circumstances) was contrary to law or to the evidence. Following defense counsel's argument that the offenses committed in the present case were not sufficiently grievous to justify the death penalty, the court stated it had examined and carefully reviewed the testimony presented and had found that the jury's verdict was supported by the weight of the evidence and that defendant was guilty beyond a reasonable doubt.

The court then considered each section 190.3 factor in turn, devoting the greatest amount of time to factor (a), the circumstances of the crime. The court summarized the evidence, emphasizing that the telephone lines in the kitchen and the den had been cut, and that the victim had been raped, beaten, stabbed, and intentionally tortured by defendant. The court described in detail the condition of the body and recounted the expert testimony concerning the nature of the victim's injuries and defendant's purpose in inflicting them. The court also noted that defendant had transported the victim's body to another location.

The trial court's discourse on section 190.3, factor (a), was sufficiently detailed and thorough to justify the determination made by the court. It is readily apparent the court provided far more elaboration than did the trial court in Rodriguez, supra, 42 Cal.3d 730, and defendant does not indicate what additional elements he believes the court should

have considered in deciding whether the circumstances of the capital offense constituted a factor in aggravation. We conclude the court adequately stated its reasons for determining that the circumstances of the crime constituted an aggravating factor.

2. Defendant's role in the crime.

Section 190.3, factor (j), specifies that among the matters to be considered by the trier of fact in determining the penalty is "[w]hether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor." Defendant contends that, because the evidence merely established the inapplicability of factor (j), it was improper for the trial court to consider, as a factor in aggravation, the circumstance that defendant acted alone.

We have indicated or implied in numerous prior decisions that factor (j) may be considered only as a mitigating factor, and that where the defendant is not an accomplice whose participation in the offense is relatively minor, the factor is simply inapplicable and should not be considered as aggravating. (People v. Daniels, supra, 52 Cal.3d 815, 889; People v. Gallego, supra, 52 Cal.3d 115, 200; People v. Gonzalez, supra, 51 Cal.3d 1179, 1233-1234; People v. Hamilton, supra, 48 Cal.3d 1142, 1184; People v. Burton,

supra, 48 Cal.3d 843, 865; People v. Walker (1988) 47 Cal.3d 605, 643-644; People v. Hernandez, supra, 47 Cal.3d 315, 363-364; People v. Adcox, supra, 47 Cal.3d 207, 273; People v. Moore (1988) 47 Cal.3d 63, 92 & fn. 13; People v. Karis (1988) 46 Cal.3d 612, 652; People v. Brown, supra, 46 Cal.3d 432, 455-456 & fn. 10; People v. Siripongs (1988) 45 Cal.3d 548, 582-583; see People v. Davenport, supra, 41 Cal.3d 247, 288-290.) Nonetheless, in People v. Howard, supra, 1 Cal.4th 1132, 1195, we approved the trial court's treatment of evidence of that defendant's sole participation as aggravating under factor (j). We need not decide the issue raised by the apparent conflict among these decisions, because any error in the present case would not have been prejudicial.

The People indicate that the failing, if any, in the trial court's consideration (under section 190.3, factor (j)) of the evidence that defendant had acted alone, consists in the court's already having considered defendant's singular and active role in the offense when the court reviewed the circumstances of the offense under section 190.3, factor (a). In his reply brief, defendant contends that the trial court did, in fact, err in this regard.

Our review of the record reveals, however, that at no time during the court's discourse on the circumstances of the offense did it emphasize, or even mention, that defendant had acted alone. That the court reviewed defendant's

commission of the offense (and the nature of that offense) does not lead to the conclusion that the court considered defendant's exclusive participation in the acts as a circumstance in aggravation under section 190.3, factor (a). Aside from the court's consideration, under section 190.3, factor (j), of defendant's role in the offense, the only other reference by the court to the circumstance that defendant acted alone was made in the context of its review of section 190.3, factor (g), addressing whether defendant had acted under extreme duress or under the domination of another person. In the latter part of its review, the court simply noted that, because defendant had acted alone, factor (g) was inapplicable. The court did not consider twice the evidence that defendant had acted alone in conceiving and carrying out the offense, and therefore, any error in considering this circumstance under factor (j) was harmless. (People v. Burton, supra, 48 Cal.3d 843, 865; People v. Adcox, supra, 47 Cal.3d 207, 273.)

3. Defendant's age and prior felony convictions.

Defendant next asserts the trial court erred in determining that, although defendant's age (twenty years, three and one-half months at the time of the offense) "could be a mitigating factor," the circumstances that defendant had been convicted of three prior felonies, had violated probation in March 1981, and was on parole at the time he committed the

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present offense, rendered defendant's age neither a mitigating nor an aggravating factor.

Depending upon the circumstances of the crime, age properly can be considered either as a mitigating or an aggravating factor. (People v. Mitcham, supra, 1 Cal.4th 1027, 1076; People v. Edwards, supra, 54 Cal.3d 787, 844.) It functions "'as a metonym for any age-related matter suggested by the evidence or by common experience or morality that might reasonably inform the choice of penalty.'" (People v. Mitcham, supra, 1 Cal.4th 1027, 1076.)

Therefore, in the present case the trial court was not obligated to treat defendant's age as a factor in mitigation. Moreover, we believe that although the court expressed itself somewhat imprecisely, in essence it weighed the two factors of defendant's age and his prior felony convictions in concluding, in light of defendant's prior record, that the circumstance that he was between 20 and 21 years of age at the time he committed the present offense was not entitled to much weight. The court properly weighed these factors in assessing whether the penalty was appropriate. (See, e.g., People v. Hamilton, supra, 48 Cal.3d at pp. 1186-1187.)13/

13/ Because the trial court did not consider any "invalid aggravating factor" (including any aggravating factor not supported by substantial evidence) in denying the motion under section 190.4, subdivision (e), Sochor v. Florida (1992) ___ U.S. ___, ___ [119 L.Ed.2d 326, 112 S.Ct. 2114, 2120-2123], cited in defendant's supplemental brief, has no application to the present case.

4. Consideration of other extenuating circumstances.

Defendant contends that the court inadequately stated its reasons for concluding no mitigating circumstances were present under section 190.3, factor (k),14/ and that the court's statement did not indicate it had assessed the credibility of the witnesses, determined the probative force of the testimony, and weighed the evidence.

As described above, the court reiterated that it had evaluated all the evidence and expressly considered the evidence or absence of evidence relating to each successive factor, examining carefully the evidence in mitigation. After expressing its views as to the applicability of section 190.3, factor (k), the court stated: "As required by law, the Court has considered all the evidence adduced at the penalty phase of the trial and has been guided by the aforesaid factors, and

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14/ The court stated: "[T]he final factor is, quote, any other circumstances which extenuate the gravity of the crime, even though it is not a legal excuse for the crime, including but not limited to the defendant's character, background, history, mental condition and physical condition, end quote. [¶] The evidence adduced at the penalty phase of the trial causes the court to find that there are no circumstances which extenuate the gravity of the crimes which you committed and for which you have been convicted. Therefore, the Court finds that this factor constitutes neither a mitigating nor an aggravating factor."

4. Consideration of other extenuating circumstances.

Defendant contends that the court inadequately stated its reasons for concluding no mitigating circumstances were present under section 190.3, factor (k),[14] and that the court's statement did not indicate it had assessed the credibility of the witnesses, determined the probative force of the testimony, and weighed the evidence.

As described above, the court reiterated that it had evaluated all the evidence and expressly considered the evidence or absence of evidence relating to each successive factor, examining carefully the evidence in mitigation. After expressing its views as to the applicability of section 190.3, factor (k), the court stated: "As required by law, the Court has considered all the evidence adduced at the penalty phase of the trial and has been guided by the aforesaid factors, and

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instances in which the trial court reiterated that it independently had reviewed the evidence, and the particularity with which the court reviewed the evidence, we conclude the court properly understood and performed the obligation imposed upon it by section 190.4, subdivision (e).

III. CONCLUSION

The judgment is affirmed in its entirety.

GEORGE, J.

WE CONCUR:

LUCAS, C.J.
PANELLI, J.
ARABIAN, J.
BAXTER, J.

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PEOPLE v. PROCTOR
S004555 [Crim.23185]

CONCURRING AND DISSENTING OPINION BY KENNARD, J.

I concur in the judgment. I write separately to emphasize that the authority of trial courts to comment on the evidence is subject to strict limitations and must be exercised with extreme caution, and to express my view that, consistent with this court's well-established case law, factor (j) of Penal Code section 190.3 cannot be an aggravating circumstance.

I.

Our Constitution (Cal. Const., art. VI, § 10), as well as our statutes (Pen. Code, §§ 1093, subd. (f), 1127), grant trial courts the authority to comment on the testimony and credibility of witnesses. But there is a countervailing consideration. The Constitutions of both the United States (U.S. Const., Amend. VI) and the State of California (Cal. Const., art. I, § 16) also grant a criminal defendant the right to a jury trial, and that right requires that the jury be the exclusive arbiter of questions of fact and the credibility of witnesses. (See e.g., People v. Rodriguez (1986) 42 Cal.3d 730, 766; People v. Friend (1958) 50 Cal.2d 570, 577-578; People v. Ottey (1936) 5 Cal.2d 714, 728.)

There is an inherent tension between the authority of a trial court to comment on the evidence and the right of a criminal defendant to a jury trial. A court's exercise of its authority to comment on the evidence always poses the danger of a violation of the right to jury trial. Because a judge presiding over a trial necessarily has substantial influence on the jury (Bollenbach v. United States (1946) 326 U.S. 607, 612), every judicial comment on the evidence carries with it an appreciable risk that the jury may discount its own view of the evidence in deference to the judge's opinion. (People v. Cook (1983) 33 Cal.3d 400, 407.) Therefore, in the interest of protecting the right to jury trial while giving efficacy to our state Constitution's grant of authority to comment on the evidence, appellate courts have imposed strict limitations on the trial court's authority to comment.

Thus, a trial court's comments on the evidence must be "necessary for a proper determination of the cause." (Cal. Const., art. VI, § 10.) They must assist, not coerce, the jury. (People v. Rodriguez, supra, 42 Cal.3d at pp. 767-768.) The court must inform the jurors that they are the exclusive judges of all questions of fact and of the credibility of witnesses. (Pen. Code, § 1127; People v. Brock (1967) 66 Cal.2d 645, 651.) The comments must be made with a view to protecting the rights of the defendant. (People v. Brock, supra, 66 Cal.2d at p. 650.) They must be accurate, temperate, scrupulously fair, and made with wisdom and restraint. (People v. Cook, supra, 33 Cal.3d at p. 408.) The comments may not (1) be argumentative (ibid.); (2) distort the law or the record (People v. Brock, supra, 66 Cal.2d at p. 650; People v. Friend, supra, 50 Cal.2d at p. 577); (3) withdraw evidence from the jury's consideration (People v. Brock, supra, at p. 650); (4) expressly or impliedly direct a verdict (People v. Cook, supra, 33 Cal.3d at p. 408; People v. Brock, supra, 66 Cal.2d at p. 650); or (5) express a view on the ultimate issue of guilt or innocence (People v. Melton (1988) 44 Cal.3d 713, 735).

In this case, the trial court's comments came perilously close, but did not cross, the line between permissible jury assistance and prohibited coercion. The court made its remarks without notice to counsel and after it was aware that the jury had deadlocked 11 to 1. The comments, however, were accurate and did not distort the record. Immediately before and after the comments, the court reminded the jury that it was the exclusive arbiter of questions of fact and the credibility of the witnesses, and that it was free to disregard any or all of the trial court's comments. The jury then continued its deliberations for approximately four hours. (Compare People v. Cook, supra, 33 Cal.3d at p. 406 [jury returned verdict fourteen minutes after trial court's comments].)

the commission of the offense was relatively minor" in deciding whether to impose the death penalty. Thus, if the defendant is an accomplice whose role in the offense was relatively minor, the jurors must consider this fact as a circumstance in mitigation, although they are free to give it whatever weight they deem appropriate. If these conditions are not satisfied, factor (j) is inapplicable, as the defendant's conduct in this regard is not "more serious than 'normal'" for a person who has been convicted of murder with special circumstances. (People v. Daniels (1991) 52 Cal.3d 815, 889; People v. Burton (1989) 48 Cal.3d 843, 864-865; People v. Adcox (1988) 47 Cal.3d 207, 273; People v. Siripongs (1988) 45 Cal.3d 548, 583; see also People v. Davenport (1985) 41 Cal.3d 247, 289-290.)

When, as here, the defendant is the sole perpetrator of the murder, factor (j) does not apply, as this court has held on numerous occasions. (People v. Daniels, supra, 52 Cal.3d at p. 889; People v. Hamilton (1989) 48 Cal.3d 1142, 1184; People v. Hernandez (1988) 47 Cal.3d 315, 364; People v. Karis (1988) 46 Cal.3d 612, 652; People v. Brown (1988) 46 Cal.3d 432, 455-456 & fn. 10; People v. Siripongs, supra, 45 Cal.3d at p. 583; see also People v. Gallego (1990) 52 Cal.3d 115, 200; People v. Gonzales (1990) 51 Cal.3d 1179, 1233-1234; People v. Burton, supra, 48 Cal.3d at pp. 864-865; People v. Adcox, supra, 47

Cal.3d at p. 273; People v. Walker (1988) 47 Cal.3d 605, 643-644; People v. Moore (1988) 47 Cal.3d 63, 92 & fn. 13.)

The majority puts in doubt the continuing validity of all these cases by asserting that they are now in "apparent conflict" with People v. Howard (1992) 1 Cal.4th 1132, 1195. But the opinion in Howard provided no reasoning or analysis to support the one sentence in that opinion that is arguably inconsistent with this otherwise unbroken line of authority, nor did it discuss or even acknowledge any of the contrary decisions listed above. The suggestion in Howard that factor (j) can be aggravating carries no persuasive force and should therefore be disapproved.

In People v. Hernandez, supra, 47 Cal.3d 315, 364, this court said that because the defendant in that case was the sole perpetrator of the murders, factor (j) "obviously did not apply . . . ." What was obvious to a unanimous court in Hernandez has become obscure to the current majority, and for no good reason. The mandate of this court is to settle important questions of law (Cal. Rules of Court, rule 29(a)), not to unsettle them. I decline to join the majority in unsettling the proper meaning and scope of factor (j).

KENNARD, J.

PEOPLE v. WILLIAM ARNOLD PROCTOR

S004555

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TRIAL COURT: Sacramento County Superior Court

TRIAL COURT #: 65383

The information provided here is not intended to reflect that which will appear in official reports.

C O P Y

PEOPLE v. PROCTOR

S004555 [Crim. 23185]

DISSENTING OPINION BY MOSK, J.

I dissent.

In my view, the court committed reversible error by commenting as it did on the evidence and defendant's credibility.

I

Trial on the question of guilt or innocence was conducted in late 1982 in rural Shasta County. It was charged that, on April 21 or 22 of that year, defendant burglarized the residence of Bonita Bergh Stendal in the small mountain community of Burney and there proceeded to rape and murder the woman; it was alleged that he intentionally inflicted great bodily injury on Stendal in the course of the burglary and the rape, and that he murdered her under the special circumstances of felony-murder-burglary, felony-murder-rape, and torture murder.

Between December 8 and 14, the People presented evidence to establish defendant's guilt. Included were three palm prints at Stendal's residence: a bloody and visible

print from defendant's right hand, and two dry and latent prints, one from his right hand, the other from his left. Also offered were various extrajudicial statements he had made relating to his activities and whereabouts on April 21 and 22.

On December 14, defendant presented evidence. He took the stand to deny involvement in the crimes and to attempt to explain his palm prints and extrajudicial statements. He sought to exculpate himself and to inculpate his friend Robert Manley.

On December 15, the prosecutor and defense counsel delivered their summations. The prosecutor's position was, of course, that defendant was guilty. He argued, in part, as follows: Stendal had been murdered; someone was obviously responsible; that someone was defendant; his palm prints placed him in the Stendal residence; true, he gave exculpatory testimony about his activities and whereabouts on April 21 and 22, within the house and without; his statements on the stand, however, did not explain the palm prints and were inconsistent with his statements out of court, which in turn were inconsistent with each other; as a result, his exculpatory testimony lacked credibility. Defense counsel's position was to the contrary. His argument included an attempt to counter practically all the prosecutor's points.

Also on December 15, the jury was instructed on the murder, rape, and burglary charges and the special

circumstance and great-bodily-injury allegations. The panel then commenced its deliberations and spent less than an hour at the task. The court recessed the proceedings for the day.

On December 16, at morning's opening, the court effectively instructed the jury to begin its deliberations anew after it substituted an alternate juror in place of one of the original members, whom as it stated it had discharged on stipulation because of a sudden illness. The panel deliberated about four and one-quarter hours. The foreman then reported to the court that the jurors were at an impasse and requested direction on how to proceed. The court asked whether the panel had voted on murder. The foreman said yes. The court asked for the numerical count without disclosure of the position as to guilt or innocence. The foreman said 11 to 1. The court asked whether the panel had voted on rape. The foreman said no. The court posed the same question about burglary. The foreman gave the same answer. The court then informed the jurors that they faced a situation that was not unusual, and might need more time to make their determinations. It recessed the proceedings for the day.

On December 17, the jury deliberated about two and one-half or three and one-half hours. At the foreman's request, the court reread the instructions to the panel. The jury deliberated about one and one-half hours more.

Late that afternoon, the foreman sent the court a note that Juror Mae Lois Turner -- who was evidently the only Black person on the panel -- "would like to disqualify self. Would like to be replaced by alternate."

In open court, in the presence of the other members of the panel, Juror Turner confirmed the report. The court asked, "Why is it you wish to disqualify yourself?" She answered, "Because I'm the one," "I'm the one who is -- there is eleven to one. I'm the one." The court stated, "That would not be -- that's not justification for disqualification. If you have some problem -- " She interjected, "I don't have any problem, Judge," and explained, "I have my opinion and I don't want to be -- I don't want to be pressured into doing something, and they have their opinion, and I have mine." The court responded, "Well, that's fine. There is no problem with that, so long as you're discussing the evidence." One of the jurors remarked, "Everybody is getting tired with one another."

Addressing all the jurors, the court stated that the case was complicated and relatively little time had been spent in deliberations. It reread the instruction that both the People and defendant were entitled to the individual opinion of each juror. It also reminded the jurors that they were under a duty to proceed conscientiously, and expressed its belief that they were doing so. It then noted the

lateness of the hour. It determined that the panel had not voted on any of the charges or allegations other than murder. It recessed the proceedings until December 20.

On December 20, without notice to the People or defendant and before deliberations resumed, the court made a comment to the jurors and alternate jurors concerning the evidence and defendant's credibility. It opened with a statement that its words were intended to be "advisory only" and were "not binding." It then proceeded: there was no question that the killing of Stendal was murder; rather, the basic question was whether defendant was the murderer; his palm prints placed him in the Stendal residence; true, he gave exculpatory testimony about his activities and whereabouts on April 21 and 22, within the house and without; his statements on the stand, however, did not explain the palm prints and were inconsistent with his statements out of court, which in turn were inconsistent with each other; as a result, his exculpatory testimony lacked credibility. It closed by repeating its statement that its words were intended to be "advisory only" and were "not binding."[1/]

1/ "Ladies and gentlemen of the jury and the alternates, for the purpose of assisting you in deciding this case, I am permitted by the [C]onstitution of California to comment on the issues, the evidence and the testimony and credibility of any witness. And it occurred to me that before you retired to continue your deliberations this morning that some comment along those lines might be of some assistance to you.

"Now, you should keep in mind that my comments are intended to be advisory only, and are not binding on you, as
(Footnote continued on next page.)

The jury then deliberated about three and one-half or four and one-half hours. It returned guilty verdicts on each of the charges and true findings on each of the allegations.

(Footnote continued from previous page.)
you are the exclusive judges of the questions of fact submitted to you and of the credibility of the witnesses. You should disregard any or all of the comments, if you do not agree, if they do not agree with your views of the evidence and the credibility of the witnesses.

"Now, under California law, by definition, the word 'homicide' means the killing of one human being by another, either lawfully or unlawfully. Now, under the instructions that I've given you, the word homicide includes murder. And I've given you in that connection instructions on first degree murder as well as instructions on second degree murder. There is the word homicide, however, also means the lawful killing of another -- of a person by another. And that's in situations where the act occurs as a result of some excusable or justifiable -- under the law -- reason for killing. In this particular case, we do not have a justifiable or lawful killing of a human being by another. There shouldn't be any doubt in anyone's mind that the death, the killing of Bonita Bergh Stendal was an unlawful killing of her by another person. There is absolutely no evidence whatsoever that she was killed in self defense or any other type of reason or that she killed herself. There shouldn't be any doubt in anyone's mind on the facts that have been presented in this case, that we have an unlawful killing of Ms. Stendal by another person.

"Now, the real question in this case is whether the State, the district attorney, has proved beyond a reasonable doubt that the defendant is legally responsible for the killing. That's basically the issue here, as well as if the State has proved beyond a reasonable doubt that the defendant is legally responsible for the killing, have they proved beyond a reasonable doubt that it's murder in the first degree or murder in the second degree. And if they've proved beyond a reasonable doubt that it's murder in the first degree, you go on to whether they proved beyond a reasonable doubt any one or more of the special circumstances that have been mentioned. And you are also called upon to determine as to whether they've proved beyond a reasonable doubt that the defendant committed the rape, whether they proved beyond a reasonable doubt the defendant committed a burglary.

"Now, in that connection, there have been several statements attributed to the defendant out of court concerning his whereabouts and activities on the night of
(Footnote continued on next page.)

II

Article VI, section 10 of the California Constitution (hereafter article VI, section 10) declares in relevant part that "The court may make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the cause."

(Footnote continued from previous page.)
April the 21st and the early morning hours of April the 22nd. These statements attributed to him are inconsistent with one another and are also inconsistent with his testimony here in court concerning his activities that evening and in the early morning hours of April the 22nd.

"Now, the district attorney has placed him in the house of Bonita Bergh Stendal through three palm prints; one bloody right palm print . . . was created by blood being on the palm first and then transferred . . . . In addition to that, . . . there were two dry palm prints. By that, they were latent, there was a left palm print, which was latent . . . . And another dry palm print of the right palm. . . .

"Now, the defendant has testified and given you an explanation as to what he did in that house that morning which explains the presence of the bloody palm print, but does not explain the presence of the two dry or latent palm prints. Under those circumstances, I have difficulty in believing the testimony of the defendant. Now, again, my comments are intended to be advisory only and are not binding on you as you are the exclusive judges of the questions of fact submitted to you and of the credibility of the witnesses. You should disregard any or all of the comments that I've made if they do not agree with your views of the evidence and the credibility of the witnesses."

The purpose of the provision is to allow the trial judge to use his "training in analyzing testimony" and "experience in determining the credibility of witnesses" "to assist the jurors in determining what evidence has a bearing on the disputed issues in the case and to aid them in weighing the evidence . . . ." (People v. Brock (1967) 66 Cal.2d 645, 650, "overruled" on a point not implicated herein, People v. Cook (1983) 33 Cal.3d 400, 413, fn. 13, overruled in turn on a point not implicated herein, People v. Rodriguez (1986) 42 Cal.3d 730, 770.)

The provision, of course, is subject to the criminal defendant's right to trial by jury under both the United States and California Constitutions. The Sixth Amendment to the federal charter, as made applicable to the states by the due process clause of the Fourteenth Amendment, declares that "In all criminal prosecutions, the accused shall enjoy the right to a . . . trial[] by an impartial jury . . . ." Article I, section 16 of the state charter provides that "Trial by jury is an inviolate right and shall be secured to all . . . ."

Under article VI, section 10, a court has broad power in delivering a comment. (E.g., People v. Rodriguez, supra, 42 Cal.3d at p. 766.) But that power is not unlimited. (E.g., People v. Brock, supra, 66 Cal.2d at p. 650.) As noted, the constitutional authority has been

given to judges for the purpose of assisting jurors. A judge must, of course, cleave fast to the judicial role and not adopt that of an advocate. (See, e.g., People v. Friend (1958) 50 Cal.2d 570, 577 [construing former § 19 of art. VI of Cal. Const., which was the predecessor of present § 10 of art. VI of Cal. Const., and was virtually identical in relevant part thereto], "overruled" on a point not implicated herein, People v. Cook, supra, 33 Cal.3d at p. 413, fn. 13.) Also, any remarks he may make must further, and not frustrate, the defendant's "right to independent jury determination of the facts bearing on his guilt or innocence." (People v. Rodriguez, supra, at p. 766.) Accordingly, he may not state or suggest his own views on guilt or innocence. (People v. Cook, supra, at pp. 412-413; see People v. Rodriguez, supra, at p. 770.) To do so would "necessarily interfere[] with the jurors' ability to freely perform their fact-finding responsibility." (People v. Cook, supra, at p. 413.)

Not only is the court's power to comment broad, it is also "most potent." (People v. Robinson (1946) 73 Cal.App.2d 233, 237 [construing former § 19 of art. VI of Cal. Const.].) "'The influence of the trial judge on the jury is necessarily and properly of great weight,' [citation], and jurors are ever watchful of the words that fall from him." (Bollenbach v. United States (1946) 326 U.S. 607,

612.) "The point need not be labored that the members of the jury are apt to give great weight to any hint from the judge as to his opinion on the weight of the evidence or the credibility of the witnesses . . . ." (People v. Robinson, supra, at p. 237.) Accordingly, the court must exercise its power "with great care" (People v. Rincon-Pineda (1975) 14 Cal.3d 864, 886) and "with wisdom and restraint" (People v. Shannon (1968) 260 Cal.App.2d 320, 331), "lest [it invade] the province of the jury as trier of fact" (People v. Rincon-Pineda, supra, at p. 886) or indeed "control the verdicts" (People v. Brock, supra, 66 Cal.2d at p. 650).

It follows that, even if it proceeds ever so cautiously, a court passes beyond the bounds of what is permitted under article VI, section 10 when its comment "hinders rather than helps the jury to perform its duty in properly considering the case." (People v. Oliver (1975) 46 Cal.App.3d 747, 753.) Such a situation is present, for example, where the remark "provides for the jury a means to avoid the preliminary determinations called for by the instructions on the law and instead to rely on the words of the judge in returning a conviction." (People v. Brock, supra, 66 Cal.2d at p. 651.) A court also exceeds the permissible by making what is "tantamount to an argument to convict" (People v. Flores (1971) 17 Cal.App.3d 579, 588) and -- a fortiori -- by stating or suggesting its own views on

guilt or innocence (People v. Cook, supra, 33 Cal.3d at pp. 412-413).

III

Applying the foregoing principles to the facts of record, I conclude that the court committed reversible error by commenting as it did on the evidence and defendant's credibility.

Error is manifest.

To begin with, the court did not proceed "with great care" (People v. Rincon-Pineda, supra, 14 Cal.3d at p. 886) or "with wisdom and restraint" (People v. Shannon, supra, 260 Cal.App.2d at p. 331). Indeed, its intervention was altogether precipitous. Almost three full days had passed since the jury had last deliberated. Comment was premature before the jurors had returned to their task and expressed some difficulty. It was also imprudent without notice to the People and defendant.

More troubling, the court's comment was "tantamount to an argument to convict" (People v. Flores, supra, 17 Cal.App.3d at p. 588) and indeed suggested that the court itself believed defendant was guilty, and could only have "hinder[ed] rather than help[ed] the jury to perform its duty in properly considering the case" (People v. Oliver, supra, 46 Cal.App.3d at p. 753).

Recall that part of the prosecutor's summation and the substance of the court's comment were to the same effect: Stendal had been murdered; defendant's palm prints placed him in her residence; true, he gave exculpatory testimony about his activities and whereabouts on April 21 and 22, within the house and without; his statements on the stand, however, did not explain the palm prints and were inconsistent with his statements out of court, which in turn were inconsistent with each other; as a result, his exculpatory testimony lacked credibility.

It is plain that the jury would have heard the court's comment as tantamount to an argument for conviction. How could it not? The substance of the comment was the same as part of the prosecutor's summation: it added nothing and it subtracted nothing. The prosecutor's summation was, literally, an argument for conviction. The court's comment effectively approved and adopted what was urged therein. From all that appears on the face of record, the court did not deliver the words in the passionate manner evidently employed by the prosecutor. But it delivered them nonetheless.

It is also plain that the jury would have heard the court's comment to suggest that the court itself believed defendant was guilty. Again, how could it not? Innocence depended on the credibility of defendant's exculpatory

testimony. The court expressed its own view on the question in no uncertain terms: " . . . I have difficulty in believing the testimony of the defendant."

It follows that the court's comment could only have hindered the jury in the proper consideration of the case. The remark allowed the panel "to rely on the words of the judge in returning a conviction" and so "avoid the preliminary determinations called for by the instructions on the law" (People v. Brock, supra, 66 Cal.2d at p. 651) -- determinations it clearly found difficult.

To be sure, the court told the jurors that its comment was intended to be "advisory only" and was "not binding." Such an incidental statement, however, is "insufficient to neutralize" the improper remark's "potent effect." (People v. Cook, supra, 33 Cal.3d at p. 410, fn. 9.)

The majority's discussion is generally unobjectionable so far as it goes. But it simply does not go far enough. It fails to discern that the court's comment was tantamount to an argument for conviction and, as such, could only have hindered the jury in the proper consideration of the case. That the trial judge's words were not identical to those in other cases is obvious -- and unimportant.

I now turn from the fact of error to its consequences. "Particularly in a criminal trial," such as this, "the judge's last word is apt to be the decisive

word." (Bollenbach v. United States, supra, 326 U.S. at p. 612.) The court's erroneous comment was its final remark. Evidently, it was dispositive. About four hours thereafter, the jury returned guilty verdicts on all the charges and true findings on all the allegations -- even though it had been unable to agree on any verdict or finding in the approximately nine hours that preceded. Accordingly, I am "of the opinion that the error . . . has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13.)2/

IV

In passing, I make the following observations.

First, contrary to the majority's implication, I believe that a challenge, based on Stringer v. Black (1992) 503 U.S. ___ [112 S.Ct. 1130] (Stringer), to the standard jury instruction on the determination of penalty would surely prove substantial.

In Stringer, the United States Supreme Court held that "if a State uses aggravating factors in deciding who shall be eligible for the death penalty or who shall receive

---

2/ Because of the result I reach, I need not and do not consider whether the court's erroneous comment effectively denied defendant his right to trial by jury under either the Sixth Amendment to the United States Constitution or article I, section 16 of the California Constitution or both.

the death penalty, it cannot use factors which as a practical matter fail to guide the sentencer's discretion" in contravention of the Eighth Amendment. (503 U.S. at p. ___ [112 S.Ct. at p. 1139].) It explained: "Although our precedents do not require the use of aggravating factors, they have not permitted a State in which aggravating factors are decisive to use factors of vague or imprecise content. A vague aggravating factor employed for the purpose of determining whether a defendant is eligible for the death penalty fails to channel the sentencer's discretion. A vague aggravating factor used in the weighing process is in a sense worse, for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance." (Id. at p. ___ [112 S.Ct. at p. 1139].) Of course, California uses "aggravating factors" -- labeled "special circumstances" (Pen. Code, § 190.2, subd. (a)) -- to determine death eligibility. It also uses "aggravating factors" -- bearing that very label (id., § 190.3) -- to decide between life and death.

A narrow Stringer challenge could specifically attack any one or more of the factors set out in the standard jury instruction on the determination of penalty as vague and, for that reason, likely to invite an arbitrary and capricious choice of punishment in violation of the Eighth

Amendment. Defendant raises such a claim against factor (a), which covers "[t]he circumstances of the crime." The majority dismiss the point. I am dubious. That "[t]he United States Supreme Court itself has established that the circumstances surrounding a capital offense constitute one of the criteria upon which the jury should base its penalty determination" (maj. opn., ante, at p. ___ [typed maj. opn. at p. 69], italics in original) is of no consequence. What is dispositive is not what jurists on appellate courts may announce, but what lay persons on juries may understand.

A broader Stringer challenge could generally attack the standard jury instruction on the determination of penalty as vague at its very core and, for that reason, highly likely to invite an arbitrary and capricious choice of punishment in violation of the Eighth Amendment. Certainly, the instruction raises more questions than it answers. For example, on what does the determination of penalty turn? What do the terms "aggravation" and "mitigation" mean? Which of the factors are potentially aggravating and/or mitigating? (See People v. Bacigalupo (1991) 1 Cal.4th 103, 152-154 (conc. opn. of Mosk, J.), vacated and remanded sub nom. Bacigalupo v. California (1992) ___ U.S. ___ [113 S.Ct. 32], for further consideration in light of Stringer v. Black, supra, 503 U.S. ___ [112 S.Ct. 1130].)

Second, factor (j) -- "[w]hether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor" -- is potentially mitigating and not potentially aggravating. "'[A]ggravation' means that which increases the defendant's personal moral culpability above the level of blameworthiness that inheres in the capital offense. By contrast, 'mitigation' means that which reduces his culpability below that level." (People v. Bacigalupo, supra, 1 Cal.4th at p. 153 (conc. opn. of Mosk, J.).) Numerous decisions of this court by many of its members establish the fact that factor (j) is potentially mitigating only. In her concurring and dissenting opinion herein, Justice Kennard proves the point beyond peradventure. Reason also establishes the fact. The question posed in factor (j) calls for one of two answers. A determination that the defendant was, in actuality, a minor accomplice may lead to the conclusion that his culpability was less than that generally reflected by commission of the offense. But a determination that he did not play such a role simply does not lead to the conclusion that his culpability was greater. Loose and uncertain dictum arguably to the contrary, which appears in a single opinion that does not cite any authority or present any analysis, should be disapproved forthwith. It should not be used, as by the majority, to "create" a "conflict" where none exists.

V

Because the court committed reversible error by commenting as it did on the evidence and defendant's credibility, I would reverse the judgment.

MOSK, J.

APPENDIX B

SUPREME COURT
FILED
MAR 10 1993
Robert Wandruff Clerk
DEPUTY

No. CR23185
S004555

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

THE PEOPLE, Respondent

v.

WILLIAM ARNOLD PROCTOR, Appellant

Petition for rehearing DENIED.

Mosk, J. and Kennard, J. are of the opinion the petition should be granted.

Chief Justice

APPENDIX C

Supreme Court of the United States

No.

A-894

William Arnold Proctor,

Petitioner

v.

California

O R D E R

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including July 8, 1993.

/S/ Sandra D. O'Connor
Associate Justice of the Supreme Court of the United States

Dated this 28th day of May, 1993.

CERTIFICATE OF SERVICE

I, Wendy C. Lascher, a member of the Bar of this Court, hereby certify that on this 8th day of July, 1993, copies of the PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA in the above-entitled case were mailed, first class postage prepaid, as follows:

Office of the Attorney General
State of California
1515 "K" Street
Suite 511
Sacramento, California 95814

District Attorney
Shasta County
1525 Court Street
P.O. Box 1320
Redding, California 96001

I further certify that all parties required to be served have been served.

Dated: July 8, 1993

Respectfully submitted,

LASCHER & LASCHER,
A Professional Corporation
WENDY C. LASCHER*,

By: Wendy C. Lascher
Attorneys for Petitioner
William Proctor

*Counsel of Record

OPINION AND ORDER BELOW

The opinion of the California Supreme Court, which is published at 4 Cal.4th 499 (1992), is reprinted in the Appendix to the petition filed herein [App. A].[1] The order denying petitioner's petition for rehearing, filed March 10, 1993, is reproduced at App. B of the Appendix to the petition filed herein.

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1. The opinion is cited as App. A, followed by a specific page number for that document. The order denying rehearing is App. B.

JURISDICTION

The opinion of the California Supreme Court was filed December 28, 1992 [Pet. App. A, p. 1]. Petitioner filed a timely petition for rehearing, which the court denied on March 10, 1993 [Pet. App. B].

On May 28, 1993, Justice O'Connor granted an extension of time to file this writ petition until July 8, 1993. Accordingly, this petition is timely under Rule 13 of the United States Supreme Court Rules.

This Court's jurisdiction to grant certiorari is properly evoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law . . ."

The Eighth Amendment to the United States Constitution provides:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the United States Constitution provides:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of Citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

California Penal Code section 190.3 provides, in pertinent part:

> "In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:
>
> "(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.
>
> "(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.
>
> "(c) The presence or absence of any prior felony conviction.
>
> "(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> "(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.
>
> "(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.
>
> "(g) Whether or not defendant acted under extreme duress or under the substantial domination of another person.
>
> "(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects [sic] of intoxication.
>
> "(i) The age of the defendant at the time of the crime.
>
> "(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

"(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crimes.

"(l) After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. . . ."

STATEMENT OF THE CASE

Procedural History

On April 23, 1982, petitioner William Arnold Proctor was arrested in connection with the murder of Bonita Bergh Stendal in the Northern California community of Redding. CT 481-483, 500-501.[2/] He had been released two weeks earlier from the custody of the California Youth Authority.

On May 5, petitioner was charged with three felony counts:

(1) First degree murder of the victim (California Penal Code section 187[3/]), with four special circumstances:

(a) Murder in the course of burglary (§§ 460 and 190.2(a)(17));

2. There were two reporter's transcripts in connection with the state court appeal. One reflects the guilt phase and mistried penalty proceedings in Shasta County. The other is for the subsequent retrial of the penalty phase in Sacramento County. Most file documents appear in a single clerk's transcript, with unitary pagination, cited as "CT." The Shasta court's jury instructions are collected in a separate transcript, cited as "Supp. CT."

3. All statutory references not otherwise qualified are to the California Penal Code.

(b) Murder in the course of rape (§§ 261 and 190.2(a)(17));

(c) "Especially heinous, atrocious, or cruel, manifesting exceptional depravity" murder (§ 190.2(a)(14) (petitioner's motion to dismiss this allegation was later granted) (CT 252-253); and

(d) Intentional murder involving torture (§ 190.2(a)(18)). (CT 1:1-2:22.)

(2) Rape accompanied by great bodily injury (§§ 261 and 12022.8). CT 2:23-3:3.

(3) Burglary (§§ 261 and 12022.7). CT 3:5-18; CT 6-8.

After a preliminary hearing, petitioner was held to answer for the three felonies. CT 4-5 and 10-155. Petitioner pleaded not guilty to each charge and denied the "special allegations." CT 159-160.

Two months before trial began, petitioner filed a motion for change of venue, which the court heard, considered and denied. CT 176-177, 180 and 196. The day voir dire was completed, petitioner renewed his motion to change venue, which was again heard, considered and denied. CT 274-286.

The jury was seated on December 8, 1982. The trial lasted only four court days. CT 287-299. The jury began deliberating on December 15. CT 3000. On December 20, a day after the jury announced a potential deadlock, the trial judge commented on the evidence, including his view of petitioner's

credibility. Within a few hours, the jury returned a verdict convicting petitioner of first degree murder with all then-remaining special circumstances, of rape with great bodily injury,a nd of first degree burglary with great bodily injury. CT 310-313.

The penalty phase began the next morning. After less than two hours of deliberation, the jury foreman announced the jury was deadlocked beyond possibility of resolution, whereupon the court ordered a mistrial and discharged the jury. CT 314-315.

On January 6, 1983, petitioner renewed his motion for a change of venue, which was granted. CT 323-351. The case was transferred to Sacramento County for retrial of the penalty phase only. CT 351-354. The second jury returned a verdict finding that the aggravating circumstances outweighed the mitigating ones, and that death was the appropriate punishment. CT 376-396 and 467-472.

On June 28, 1983, the Sacramento court (Hon. Sheldon H. Grossfeld) heard, considered and denied petitioner's automatic motion for modification of judgment. § 190.4(e); CT 528-555A. Petitioner's appeal to the California Supreme Court followed automatically. CT 558. Following the death of the attorney appointed to represent petitioner and appointment of another additional counsel, the California Supreme Court heard argument in October of 1992.

ISSUES RAISED BELOW (RULE 14(h))

***Stringer* v. *Black* (Vagueness) Challenge:**

Petitioner claimed California's statutory sentencing factor set forth in Penal Code section 190.3(a) is ambiguous, and challenged application of this factor to his case. Further, when the California Supreme Court ordered supplemental briefing in 1992, petitioner raised an issue regarding the penalty phase jury's use of Penal Code section 190.3(a) in determining his sentence under *Stringer* v. *Black*, *supra*, 503 U.S. ___, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992). One dissenting justice of the California court addressed the general issue of statutory vagueness in his dissenting opinion while the majority dealt only with the issue raised by petitioner. App. A, Dissenting Opinion by Mosk, pp. 14-128.

STATEMENT OF THE FACTS[4/]

Guilt Phase

Fifty-five-year-old widow Bonnie Stendal lived at 1670 Ponderosa Street in Burney. RT 2758. Burney is a small mountain community located 35 miles east of Redding in Shasta County. Mrs. Stendal taught first grade at the East Burney Elementary School. RT 2380.

Mrs. Stendal's 19-year-old son, David Stendal, lived with her at the Ponderosa Street home until the summer of 1979 when he moved to Chico. RT 2782. David Stendal had been friends

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4. All record references in this fact statement are to the Shasta County reporter's transcript, unless otherwise noted.

with petitioner William Proctor and another young man, Robert Manley, for several years before he moved to Chico.

The three young men had smoked marijuana together and petitioner knew that David Stendal frequently concealed marijuana from his mother by hiding it in various places in Mrs. Stendal's home.

In January of 1981, petitioner began the general truck driving course at the Western Truck School. Robert Schauer was petitioner's instructor at the Western Truck School and during the truck driving course petitioner received instruction on knot tying. RT 2730. Students in the truck driving school were taught to tie the trucker's hitch, two half hitches, and a sheep shank knot. RT 2730.

In April of 1982, Mrs. Neta Manley was living with her family which included her 26-year-old son Robert Manley, at 1561 Birch Street in Burney. RT 2608-2609. The Manley home on Birch Street was about a block from Mrs. Stendal's home. RT 2803.

After an absence from the Burney area, petitioner returned in the early part of 1982, and on Friday or Saturday, either April 16th or 17th, 1982, petitioner and Robert Manley made several obscene telephone calls from the phone at Manley's home. RT 2682. Robert Manley telephone Mrs. Stendal and petitioner listened to Manley in the course of that conversation. RT 2682. The conversation was of a sexual nature, and Manley told Mrs. Stendal he would like to have sexual relations with her. RT 3089. Petitioner also admitted making an obscene

telephone call during about the same time. RT 3088. The calls were made at about 3 or 4 a.m. in the morning. Four or five calls were made in total. Petitioner made one call. Robert Manley dialed a phone number, handed petitioner the phone, and petitioner then completed the obscene portion of the call. RT 2682, 3090.

Mrs. Manley worked as a custodian at Burney High School and on Wednesday afternoon, April 21, 1982, she arrived home between 2:30 p.m. and 3 p.m. after getting off work. RT 2610.

Petitioner was at the Manley home when Mrs. Manley got there. RT 2611. Petitioner had hitchhiked to the Manley home earlier that afternoon. RT 2640.

Between 3 and 5 p.m, Mrs. Manley took petitioner to the Holiday Market in Burney to buy some liquor. RT 2641.

When Mrs. Manley and petitioner got back to the house, they had a drink with Robert Manley and later the three had dinner. RT 2642.

At about 5:30 p.m., petitioner and Robert Manley walked to a nearby Fast Gas convenience market to buy cigarettes. RT 2643. Manley bought two packs of Camel non-filter cigarettes and gave one pack to petitioner. RT 2644. Both petitioner and Manley smoked the same brand of cigarettes. RT 2644.

Mrs. Manley left the house at about 7 p.m. that evening to go to the bowling alley where she kept score. RT 2644. When Mrs. Manley left, petitioner and Robert were sitting on chairs in the living room watching television. RT 2643.

On April 21, 1982, during the evening hours, Mr. Robert Schmidt, a sixth grade teacher at the Mt. Burney Elementary School, saw Mrs. Stendal at the Safeway store in Burney. Mr. Schmidt had a brief conversation with her. RT 2368.

Later that evening, at approximately 7:40 p.m., Mrs. Schmidt again saw Mrs. Stendal, this time at the Thrifty drug store in Burney. RT 2368.

Meanwhile, Robert Manley had started watching a baseball game on television shortly after 8 p.m. Petitioner said he did not want to watch it and told Manley he was leaving. RT 2645. Petitioner told Manley he was going to the local bar, either to the Rex Club or to the Sportsman Bar, to pick up a woman. RT 2646. Petitioner asked Manley if he wanted to go, but Manley said no. Before leaving, petitioner telephone his mother and told her he was going to spend the night at Manley's home. RT 2646, 2722.

At about 8:10 p.m. on April 21, petitioner arrived at Jeffrey Bohall's home at 1832 Maple Leaf Street in Burney. RT 2696. The Bohall home was about five blocks from the Manley home. RT 2803.

Petitioner remained at the Bohall home for about 45 minutes. When he left, petitioner told Jeff Bohall he was "going out to catch a buzz" and that he was "going to get a piece of butt." RT 2695.

At approximately 7:50 p.m. on April 21, 1982, Patty Olinger was in her car as it was being pushed through the intersection at Marquette and Ponderosa Streets in Burney.

As she looked down Ponderosa Street to Mrs. Stendal's home, Mrs. Olinger noticed that the residence was very well lit up and that Mrs. Stendal's car was in the driveway. RT 2375.

Mrs. Olinger had known Mrs. Stendal for two years, and during that time, Mrs. Stendal had never parked her car in the driveway. RT 2375. According to Mrs. Olinger, she always Drove in a direct line into the garage. RT 2375.

Mrs. Olinger also noticed that there was mud on Mrs. Stendal's car and that this was quite unusual since she always kept her car clean. RT 2376.

When Mrs. Manley returned home between 10:30 and 11 p.m. on April 21st, petitioner was not there and Robert was alone, watching a baseball game on television. RT 2614. Mrs. Manley sat down in her chair and watched television until she went to bed between 11:30 and 11:45 that evening. RT 2616.

Petitioner's mother, Julia Ann Proctor, testified that he did not return home on the night of April 21, 1982. RT 2721-2722.

Mrs. Stendal was brutally murdered during the time between the early evening hours of April 21st and the early morning hours of April 22nd. RT 2942-2943.

At approximately 5:30 a.m. on the morning of April 22, Sharon Palkki was in the kitchen of her home at 1649 Marquett

Street in Burney. Mrs. Palkki had known petitioner, her nephew, for a number of years. RT 2707.

As Mrs. Palkki looked out her kitchen window, she saw petitioner walking north down Marquette Street. Mrs. Palkki saw that petitioner had what looked like a pair of gloves in his right pants pocket. RT 2710. Mrs. Palkki's home was about 500 feet from Mrs. Stendal's home. RT 2803.

Between 6 and 7 on the morning of April 22, petitioner's brother, Edward Proctor, received a phone call at home from petitioner. RT 2703. Petitioner told his brother he was at the parking lot of the Holiday market in Burney and requested that his brother ask their mother to come and pick him up. RT 2703.

Meanwhile, Mrs. Stendal had not arrived to teach her first grade class. Mrs. Stendal normally arrived at the school at approximately 7:45 a.m. RT 2380-2381.

At approximately 8:55 a.m., April 22, 1982, the secretary at the elementary school, Ms. Humble, began to call Mrs. Stendal's home after she had been told that Mrs. Stendal had not shown up for school that morning. RT 2380-2382.

Ms. Humble went to Mrs. Stendal's home at about 9:05 a.m. RT 2382. Ms. Humble entered the house through an unlocked patio door, and briefly searched inside for Mrs. Stendal. She called out Mrs. Stendal's name in an attempt to locate her. At the time, Ms. Humble noted that a magazine was next to a living room couch, along with a heating pad. RT 2385. She also noted a

jar of pickles, and a caring fork on the kitchen counter. In addition, she noted a pair of slippers on the floor of the master bedroom. RT 2389.

Ms. Humble was unable to locate Mrs. Stendal and just as she was getting ready to leave, she checked the garage and saw that Mrs. Stendal's car, a 1978 silver Mercury, was parked in the garage. The police were notified of the school authorities' concern over Mrs. Stendal's absence. RT 2387.

Detective Sergeant Larry Jarrett of the Shasta County Sheriff's Department responded to the call regarding Mrs. Stendal's absence from work. RT 2398.

Detective Jarrett went to the Stendal home at approximately 9:30 a.m., and conducted a brief search for Mrs. Stendal.

Sergeant Jarrett was unable to find Mrs. Stendal but he did notice that the bed in the master bedroom was not made. RT 2403. After about five minutes Sergeant Jarrett left. RT 2404.

Sergeant Jarrett reported his findings to Lieutenant Eoff and the two men decided to return to the house to conduct a more detailed investigation. RT 2404. When they returned to the house later that morning, the officers noted that telephone lines within the home had been cut. One phone line had been cut in the den, and the other had been cut in the kitchen area. Officers also noted that Mrs. Stendal's car appeared to be muddy and that water was still dripping from it onto the garage floor when they arrived. They also noted that the trunk lid portion of the car

appeared to have been wiped down in an apparent effort to clean it. Later, a locksmith was called and the trunk was opened. On the edge of the trunk door opening, there appeared to be an area which was scraped or rubbed clean. Further, although there was nothing out of the ordinary in the trunk, officers noted that objects normally stored in the trunk appeared to have been pushed to the outer edge of the trunk floor, so that it appeared that room had been made in the center of the trunk floor so an object could be placed there. RT 2404-2406.

Officers noted that, generally, there appeared to be no sign of a struggle. They did note, however, that several of the hooks on the drapes for the patio door had been pulled from their hangers. RT 2411.

While the police were still trying to locate Mrs. Stendal, Robert Manley got up at approximately 11:30 a.m. on April 22nd and phoned petitioner. RT 2651. Petitioner told Manley that as he was walking downtown in front of Bernard's grocery store the night before, his mother drove up and picked him up and took him home. RT 2652. Petitioner then said that he would come to town later that day after he finished washing his clothes. RT 2654.

As all of the was taking place in Burney, Susan Porter and her new husband were driving back to Portland, Oregon, from Reno where they had been married on the morning of April 22, 1982. The Porters stopped their car near Lake Britten on the afternoon of April 22 to let their dog out. RT 2393. The

turnout where the Porters stopped was approximately 12 miles from Mrs. Stendal's home in Burney. RT 2442.

Mr. Porter got out of the car first and as Mrs. Porter was getting her camera ready, he came back to the van and said that he thought there was a dead body over the side of the cliff alongside the road. RT 2394-2395.

Mrs. Stendal's body was found approximately 11 feet below the edge of the roadway. There were no footprints in the immediate area of the body. It appeared that the body had been thrown from the edge of the roadway to its resting place. The body was in an upright or seated position, and had become entangled in several thorns and bushes at that location. RT 2437.

Mrs. Stendal was wearing only a nightgown. She had a green electric blanket wrapped around her. Mrs. Stendal's hands were tied behind her back with four separate cloth materials. One of the cloth items was a red, white, and blue tie or sash-like article of women's apparel. The other was a red and white cloth rolled or twisted into the shape of a rope, and tied in a "figure 8" pattern around the victim's wrist. The remaining two items were nylon stockings, one of which was tied around the victim's left wrist, three times, and tied with a single loop around the right wrist. The other nylon stocking was tied around the victim's wrist with several half hitch type knots. RT 2956.

Meanwhile, between 3 and 3:30 p.m. on April 22, 1982, Mrs. Manley drove Robert to petitioner's home in Burney to pick

up petitioner since the two boys wanted a ride into Redding. RT 2619.

Petitioner and Manley wanted to purchase some concert tickets in Redding. They were also planning to drink and were hoping to meet some girls. RT 2656. Later that day petitioner and Manley met two girls in Redding, drank beer with them, and spent the night with them at a motel in Redding. RT 2656-2664. Mrs. Manley had by that time returned back to Burney in the late afternoon or evening of April 22. RT 2620.

The next day, April 23, after it was determined that the petitioner was a possible suspect, he and Robert Manley were taken into custody in REdding as they were hitchhiking back to Burney. RT 2665.

Early in the afternoon on Friday, April 23, 1982, petitioner was interviewed by Detective Jarrett at the Sheriff's Office in Redding. RT 2803-2804. Petitioner told Detective Jarrett he had been at Robert Manley's house on the evening of April 21. RT 2806. Petitioner told Detective Jarrett he left Manley's house "at around 8:30, right after a baseball game came on," and that he "walked downtown" and "caught a ride home." RT 2806-2807. He said he caught a ride with a guy in a Chevy pickup in front of the Holiday market. RT 2807.

Petitioner said he spent the remainder of the evening at home and went to bed at about 11 p.m. RT 2807. Petitioner told Detective Jarrett he got up at around 9 a.m. the next

morning, and that he did not leave home until around 3:30 or 4 p.m. RT 2807-2808.

When Detective Jarrett asked petitioner if he had gone to Mrs. Stendal's home the evening of April 21, he said he had *not* gone there. RT 2811.

After petitioner had been taken into custody on April 23, 1982, Shasta County Sheriff's Detective Francis Brewer observed abrasions on both of petitioner's legs, below the knees, and five or six scratch marks on his left leg, above the knee. RT 2541. Photographs were taken of these marks. RT 2540-2543; Exhibit 43.

The coroner of San Francisco, Dr. Boyd Stephens, autopsied Bonnie Stendal's body on April 24, two days after it was discovered. RT 2868-2871. It was Dr. Stephens' expert opinion that the cause of death was asphyxiation, first by nonfatal manual strangulation, and later by ligature strangulation. RT 2875-2876. Mrs. Stendal's body also showed cuts and bruises from blunt force and various internal injuries, basically related to the face and neck (RT 2876-2877, 2879, 2886-2888), some of which were inflicted by seven to nine blows. RT 2888-2889. Post mortem injuries were attributed to the dragging of Mrs. Stendal's already dead body. These injuries eliminated the place of discovery as the site of the killing. RT 2879-2884.

A number of stab wounds and incisions made by a cutting instrument were found in the neck area; most of which did not

penetrate the skin deeply. These wounds were inflicted while Mrs. Stendal was immobile, and still alive, as were cuts in the chest area. RT 2889-2896, 2898-2899. These cuts were inflicted close to Mrs. Stendal's death. RT 2905. None of the stab wounds were directly involved in causing Mrs. Stendal's death. RT 2875-2878, 2922.

The curvature of some of the injuries indicated they had been inflicted slowly and deliberately. There were seven wounds less than two inches deep to the area of the right breast which had been inflicted while Mrs. Stendal still was alive but unable to move away from her assailant. In Dr. Stephen's opinion, these wounds were infliced for the purpose of causing pain or fear. RT 2890.

There were four stretching injuries outside the vagina and a fifth abrasion which was said to slide into the opening of the vagina. RT 2913-2914, 2915-2917. These injuries were caused by more than one force, four by a foreign object, possibly a penis, though of a type more often caused by something else, and a fifth probably by a penis. RT 2917-2918, 2919. There was no lubrication of the area, nor was there any sign of semen in or about any portion of the bag. RT 2918-2920. The autopsy surgeon described the knots which tied the victim's hands as possibly "truckers' hitches" knots. RT 2912-2913.

On April 24, Dr. Stephens also examined the marks on petitioner's legs, and described them as one to four days old.

Dr. Stephens had seen "these injuries" in "sexual assault" cases he had examined in San Francisco. RT 2543-2544, 2927-2928.

Mrs. Schauer of the Western Truck School recognized one of the knots used to tie Mrs. Stendal as a double half hitch knot taught at his school. RT 2734. Similarly, Mr. Schauer recognized another of the knots used to tie Mrs. Stendal as a trucker's knot which is also taught at the school. RT 2731.

Additional investigation was carried out at the victim's residence on April 30, 1982, with the assistance of Justice Department technicians and criminalists. On this occasion, the police found several magazines and pamphlets on the floor beneath the bed in the master bedroom. RT 2444. Three of these magazines had bloody prints on them, and at least two or the magazines had what appeared to be bloody palm prints on them. The palm print on one of these magazines, a religious periodical called, "Reflections," was positively identified by more than 35 comparison points as being petitioner's right palm print. RT 2831-2833. Investigation revealed that the print was made when petitioner's right palm came in contact with Mrs. Stendal's blood, and then was transposed onto the magazine cover. RT 2835. The print *was not made* by petitioner's clean hand being placed onto an already bloody magazine. A palm print lifted from another magazine positively matched petitioner's left palm. RT 2844. In addition, there was a small amount of blood under an area rug in Mrs. Stendal's bedroom. This blood was found to have been the same type as that of the victim. No other fingerprints

matching petitioner's were found in Mrs. Stendal's home. Further, the victim's automobile was checked for prints, and again none of petitioner's prints were found on the car. The officers did determine, however, that the door to the master bedroom had been wiped down with a damp rag which left little spots of dirty water on the door. RT 2491.

On May 1, 1982, Detective Jim Carter of the Shasta County Sheriff's Department interviewed petitioner's mother after she had visited petitioner in jail. RT 2728.

Mrs. Proctor told the officer that petitioner had asked her to tell Detective Jarrett that he had spent the night of the murder at home. Mrs. Proctor told petitioner that she had already talked to Detective Jarrett and told him petitioner had not spent the night at home. RT 2728.

Petitioner then asked his mother if she would tell Detective Jarrett that he had been at a party that night. RT 2728.

On May 2, 1982, Sergeant Jarrett returned to the Stendal home for a further investigation and on this occasion he found a cigarette butt on the ground outside a window on the east side of the residence. The cigarette butt was from a non-filter cigarette. RT 2448.

On the sill of the window Detective Jarrett saw indications that a hand had been on the dust, but no usable print could be lifted. RT 2448-2450.

Defense

Petitioner testified on his own behalf.

Petitioner had been friends with Mrs. Stendal's son David Stendal and Robert Manley for several years.

Petitioner testified that on April 21, 1982, he was living with his mother and two brothers on Main Street in the Johnson Park area of Burney.

At approximately 6 p.m. on the evening of April 21, 1982, petitioner was at Robert Manley's house, listening to music and drinking.

Petitioner testified that he and Manley were planning on going to see the rock group Journey at a concert in Chico. Petitioner testified that Manley did not have any money and that petitioner had to pay for everything.

Petitioner claimed that Manley had talked a lot about the kind of drugs that David (Stendal) kept in the house and about the kind of drugs that David's mom (Mrs. Stendal) had been using or something to that effect. RT 3031.

Petitioner admitted that between 8:30 and 9 p.m. he left the Manley home and went to the home of another friend, Jeff Bohall. RT 3026.

Petitioner testified he talked with Jeff Bohall and left when Bohall said he was not interested in finding some people to party with. RT 3027. Petitioner testified he left Bohall's house between 9:30 and 10 p.m. and went to a liquor store called the Bottle Shop to buy some cigarettes. RT 3077.

Petitioner claimed that from the liquor store he walked back to the Manley home, arriving there around midnight. RT 3028.

Petitioner testified that Mrs. Manley's truck was at the house when he returned and that he used the back door to enter. RT 3028-3029.

Petitioner testified that he looked for Robert Manley but could not find him in the house and eventually went to bed in the upstairs bedroom.

Petitioner claimed that he slept for a couple of hours and then woke up and started looking for Robert Manley again. Petitioner testified that when he awoke and started looking for Manley it was just starting to get light outside. Petitioner claimed that he again could not find Manley but that he did find a note on the side of Manley's dresser. RT 3030.

According to petitioner, the note was addressed to "Bill" and said that "he (Manley) was going to check Stendal's stash" and that "he'd be back shortly." RT 3030-3031.

Petitioner testified that he thought the note meant that Manley was planning on getting some drugs from the Stendal's house and selling them." RT 3033.

According to petitioner, after reading the note, he walked to the Stendal home. RT 3034.

Petitioner testified that when he got to the Stendal home, the lights in the front room were still on (RT 3035), and that the sliding glass door was open.

Petitioner testified that after he entered Mrs. Stendal's home he began looking for Bob Manley but no one was home.

Petitioner claimed that when he went into Mrs. Stendal's bedroom he noticed a puddle of blood next to the bed. RT 3039. Petitioner claimed that he "just kind of tested the blood" with his hand. RT 3040.

Petitioner said he did not recall touching any of the pamphlets which were then located on the floor between the night stand and the bed. RT 3039-3040.

Petitioner testified that it had been more than a year since he had been in the Stendal home prior to April 21, 1982. RT 3032.

ARGUMENT SUMMARY

Petitioner challenges the constitutionality of California's 1978 death penalty law on the following grounds:

(1) That the entire statute is vague because Penal Code section 190.3 supposedly does not specify which of its 11 sentencing factors are aggravating and which are mitigating.

(2) That the prosecutor's argument and the jury instructions in the instant case exacerbated the alleged vagueness of the aggravating and/or mitigating factors.

(3) That the "circumstances of the offense" factor (Penal Code § 190.3(a)) is especially vague where the jury which initially determined the defendant's guilt is not the same jury which determines his sentence.

ARGUMENT

I.

PETITIONER'S CLAIM THAT THE SENTENCING FACTORS LISTED IN CALIFORNIA PENAL CODE SECTION 190.3 ARE UNCONSTITUTIONALLY VAGUE AND SUBJECT TO ANALYSIS UNDER *STRINGER* IS NOT PROPERLY BEFORE THIS COURT SINCE IT WAS NOT RAISED BELOW AND LACKS MERIT IN ANY EVENT

Petitioner now contends for the first time that all of the eleven sentencing factors listed in Cal. Penal Code section 190.3[5/] are facially vague, in violation of the limitations

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5. Penal Code section 190.3 specifies that the factors which the jury shall take into account in selecting the appropriate penalty in a capital case are:

> (a) The circumstances of the crime. . . .
> (b) The presence or absence of criminal activity . . . which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.
> (c) The presence or absence of any prior felony conviction.
> (d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.
> (e) Whether or not the victim was a participant. . . .
> (f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.
> (g) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.
> (h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the effects of intoxication.
> (i) The age of the defendant at the time of the crime.
> (j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

imposed by the Eighth Amendment to the federal Constitution as interpreted by this Court in *Stringer* v. *Black*, 503 U.S. ___, 117 L.Ed.2d 367, 382, 112 S.Ct. 1130 (1992). Specifically, petitioner argues that a jury deciding whether to impose the sentence of death or life imprisonment must weigh these eleven factors even though the statute does not specifically designate which factors are aggravating and which are mitigating. Petitioner argues that none of these factors are adequately defined for the purpose of allowing the jury to use them in making a rational sentencing choice in capital cases.

This is the first time in this case that petitioner has raised this general vagueness challenge to the constitutionality of all 11 factors set forth in California Penal Code section 190.3. The only mention of this issue appears for the first time in dicta in Justice Mosk's dissent. The majority opinion correctly notes that the actual claim raised by petitioner focused only on a vagueness challenge to the constitutionality of section 190.3 factor (a). Opn., p. 69-70.

Petitioner now seeks to expand this limited claim into a wholesale challenge to the constitutionality of the entire list of factors set froth in Penal Code section 190.3 without ever raising this expanded issue in either the trial court or on his direct appeal to the California Supreme Court.

(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

Petitioner should not be allowed to belatedly raise this claim for the first time in these proceedings. Furthermore, even if petitioner's *Stringer* claim is properly before this Court it must be denied since the vagueness concerns enunciated in *Stringer* have no application to the sentencing factors set forth in Penal Code section 190.3.

Petitioner interprets this Court's remand in *Bacigalupo* v. *California* as the specific application of *Stringer* by this Court to Cal. Penal Code section 190.3. Pet. at 16, citing *Bacigalupo v. California*, 506 U.S. ___, 121 L. Ed. 2d 5, 113 S. Ct. 32 (1992). To the contrary, this Court's order in *Bacigalupo* was nothing more than a remand to reconsider that case in light of this Court's opinion in *Stringer*.

In *People v. Bacigalupo*, the California Supreme Court rejected a challenge to Cal. Penal Code section 190.3, subsection (b), observing that the Eighth Amendment vagueness analysis, which Petitioner is now relying on, applies only to those factors which narrow the class of death-eligible defendants. *People v. Bacigalupo*, 1 Cal. 4th 103, 147-148. On October 5, 1992, this Court granted certiorari, vacated the judgment, and remanded that case to the California Supreme Court for further consideration in light of *Strihger*. *Bacigalupo*, 121 L. Ed. 2d at 5. The matter is now pending before the California Supreme Court in case number S004764.

Petitioner's belated claim that all of the eleven factors set forth in section 190.3 are subject to a federal

constitutional vagueness analysis is based on an erroneous assumption that California's death penalty procedures are identical to the Mississippi death penalty system reviewed in *Stringer*. In *Stringer*, the state of Mississippi sought to establish that its system could be equated with the capital punishment procedures in Louisiana which had survived constitutional challenge in 1988.

In Louisiana, the narrowing of the death eligible class occurs with the finding of capital murder in the guilt phase, after which the jury must find at least one aggravating circumstance, but is not required to weigh aggravating versus mitigating factors in order to return a verdict of death. This Court upheld the Louisiana procedures, finding its use of aggravating circumstances was not comparable to their use in other states, such as Florida i.e., so called "weighing" states. *Lowenfield v. Phelps*, 484 U.S. 231, 244-245, 98 L. Ed. 2d 568, 108 S. Ct. 546 (1988); compare *Sochor v. Florida*, 504 U.S. ___, 119 L. Ed. 2d 326, 112 S. Ct. 2114 (1992); and *Espinoza v. Florida*, 505 U.S. ___, 120 L. Ed. 2d 854, 112 S. Ct. 2926 (1992).

Mississippi argued that since Mississippi narrowed the death eligible class in the guilt phase by requesting the jury to first convict the defendant of capital murder, the use of aggravating factors in Mississippi had no constitutional significance. The Mississippi Supreme Court had, however, stated in no uncertain terms that its "sentencing scheme operates in the same manner as the Florida system." *Stringer*, 117 L. Ed. 2d at

381. The Mississippi statute was also interpreted by the United States Supreme Court in light of *Godfrey v. Georgia*, 446 U.S. 420, 64 L. Ed. 2d 398, 100 S. Ct. 1759 (1980) and *Maynard v. Cartwright*, 486 U.S. 356, 361-362, 100 L.Ed.2d 372, 108 S.Ct. 1853 (1988), which dealt with the adequacy of state aggravating circumstances to channel the sentencer's discretion by narrowing the death-eligible class. See also *Shell v. Mississippi*, 498 U.S. ___, 112 L.Ed.2d 1, 111 S. Ct. 313 (1990) [reversing because of inadequate aggravating factor, citing *Maynard* and *Godfrey*]. In contrast to the situation presented in *Stringer*, neither this Court, or the California Supreme Court has interpreted the California death penalty procedures as operating in the same manner as another state wherein aggravating factors have been held to have constitutional significance.

Stringer held that the Mississippi statute which uses aggravating factors in deciding *both* who shall be eligible for the death penalty and who shall receive the death penalty, cannot use factors which as "a practical matter fail to guide the sentencer's discretion." *Stringer*, 117 L.Ed.2d at 381. In such sentencing procedures, i.e., where the aggravating factors are used both to determine who is eligible for the death penalty and who shall receive it, "use of a vague or imprecise aggravating factor in the weighing process invalidates the sentence and at the very least requires constitutional harmless-error analysis or reweighing in the state judicial system." *Stringer*, at 383; see

also *Espinoza*, 120 L. Ed. 2d at 858-859; *Sochor*, 119 L. Ed. 2d at 336.

The remand by this Court of *Bacigalupo* in light of *Stringer* does not compel the conclusion that a vagueness analysis applies to California's section 190.3 sentencing factors. In fact, application of *Stringer* would be inconsistent with this Court's well-established death penalty jurisprudence.

The constitutional requirements which a state must satisfy before imposing a death sentence were succinctly summarized in *McCleskey v. Kemp*, 481 U.S. 279, 305-306, 95 L. Ed. 2d 262, 107 S. Ct. 1756 (1987), emphasis added:

> "In sum, our decisions since *Furman* [v. *Georgia* (1972) 40 U.S. 238] have identified a constitutionally permissible range of discretion in imposing the death penalty. First, there is a required threshold below which the death penalty cannot be imposed. In this context, the State must establish rational criteria that *narrow the decision maker's judgment* as to whether the circumstances of a *particular defendant's case meet the threshold*. Moreover, a societal consensus that the penalty is disproportionate to a particular offense prevents a State from imposing the death penalty for that offense. Second, States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty. In this respect, the State cannot channel the sentencer's discretion, but must *allow it to consider any relevant information offered by the defendant.*"

Once these limits have been satisfied, "the States enjoy their traditional latitude to prescribe the method by which those who commit murder shall be punished." *Blystone v. Pennsylvania*, 494 U.S. 299, 309, 108 L. Ed. 2d 255, 110 S. Ct. 1078 (1990).

While it is incumbent upon a state to narrow the class of death-eligible defendants, there is no exclusive "right way

for a State to set up its capital sentencing scheme." *Spaziano v. Florida*, 468 U.S. 447, 464, 82 L. Ed. 2d 340, 104 S. Ct. 3154 (1984). Accordingly, this Court has found that the narrowing function may take place at either the guilt *or* penalty phase in a capital case. *Lowenfield*, 484 U.S. at 244-245.

In many states the jury's discretion is channelled through the use of aggravating circumstances, one of which must be found true before a death sentence can be appropriate. *Lowenfield*, 484 U.S. at 244. The Eighth Amendment does not compel that such aggravating circumstances be further refined or weighed by the jury. *Blystone*, 494 U.S. at 298. These aggravating circumstances which must be found true before a death sentence can be appropriate are referred to as "special circumstances" in California Penal Code § 190.2.

For those states which employ these aggravating or special circumstances to narrow the death-eligible class, the circumstances must "furnish principled guidance for the choice between death and a lesser penalty." *Richmond v. Lewis*, 506 U.S.___, 121 L. Ed. 2d 411, 113 S. Ct. 528, 91 U.S.L.W. 4013, 4015 (1992). The circumstance must "genuinely narrow the class of persons" eligible for death and must "reasonably justify" the death penalty on the defendant as compared to other convicted murders. *Zant v. Stephens*, 462 U.S. 862, 877, 77 L. Ed. 2d 235, 103 S. Ct. 2733 (1983). An aggravating circumstance which a "person of ordinary sensibility" could find applicable to any murder will not suffice. *Godfrey*, 446 U.S. at 428-429 [absent

some judicial limitation, an outrageously or wantonly vile, horrible, and inhuman aggravating factor did not adequately limit the jury's discretion].

This Court's Eighth Amendment jurisprudence demonstrates that it is primarily concerned with the *procedure* by which the state imposes a death sentence rather than with the substantive factors considered by the sentencer once the defendant falls within the class of persons *eligible* for the death penalty. *California v. Ramos*, 463 U.S. 992, 999, 77 L. Ed. 2d 1171, 103 S. Ct. 3446 (1983). After the jury's discretion has been adequately channelled by narrowing the class of death-eligible defendants, it is then free to consider "a myriad of factors to determine whether death is the appropriate punishment." *Ramos*, 463 U.S. at 1008. The jury may, at that point, "exercise unbridled discretion" in reaching its sentencing verdict. *Zant*, 462 U.S. at 875.

Each "distinct system must be examined on an individual basis." *Gregg v. Georgia*, 428 U.S. 153, 195, 49 L. Ed. 2d 859, 96 S. Ct. 2909 (1976). In light of the above principles, an examination of California law will reveal that *Stringer* has no application to California's 190.3 factors.

Under Mississippi law a finding of "capital murder" is not designed to channel juror discretion, but is a necessary prerequisite to a sentencing hearing in the same way that a California jury must find first degree murder before the defendant is death-eligible. See Miss.Code.Ann., §§ 97-3-19; 97-

3-21; see also *Cabana v. Bullock*, 474 U.S. 376, 385, 88 L. Ed. 2d 704, 106 S. Ct. 689 (1986) [discussing "capital murder" under Mississippi law].

Under Mississippi's statute the aggravating factor first narrows the class and then effectively creates a presumption of death unless outweighed by any mitigation evidence. *Stringer*, 117 L. Ed. 2d at 381-382. This Court has described Mississippi as a "weighing state." *Stringer*, 117 L. Ed. 2d at 378; see also *Richmond*, 121 L. Ed. 2d at 421 [characterizing Arizona as a "weighing state"].

While California requires jurors to weigh aggravating and mitigating factors during the penalty phase, it is not clear that this process makes California a "weighing" state within the meaning of United States Supreme Court cases. In *Stringer*, this Court focused on the fact that the sentencing authority must first find an aggravating circumstance which narrows the death-eligible class, and then weigh against that finding any mitigation. This is entirely different from California's statutory procedure.

Petitioner is no doubt focusing on the language in *Stringer* which states that an "aggravating factor" subject to Eighth Amendment analysis includes a factor used "in deciding who shall be eligible for the death penalty or *who shall receive the death penalty.*" *Stringer*, 117 L. Ed. 2d at 381, emphasis added. The fact remains, however, there is no reason to read the language underlined above as referring to California's penalty

determination procedures under Cal. Penal Code § 190.3. The reason is that the Mississippi system simultaneously addresses both "eligibility for" and "who shall receive" the death penalty in a unitary aggravating circumstance determination. California's unique statutory procedures do not address both facets simultaneously, and is, therefore, not even indirectly considered in *Stringer*.

Before a criminally charged defendant is eligible for death in California, that person must be convicted of first degree murder and at least one special circumstance, found true beyond a reasonable doubt. California Penal Code, § 190.1. "A single valid special circumstance finding is sufficient to determine that defendant is eligible for the death penalty." *People v. Bittaker*, 48 Cal. 3d 1046, 1102, 259 Cal. Rptr. 630, 774 P.2d 659 (1989). California's special circumstances findings are, of course, subject to Eighth Amendment vagueness analysis. See, e.g., *People v. Davenport*, 41 Cal. 3d 247, 260-271, 221 Cal.Rptr. 794, 710 P.2d 861 (1985) [torture special circumstance]; *People v. Edelbacher*, 47 Cal. 3d 983, 1025, 254 Cal. Rptr. 586, 766 P.2d 1 (1989) [financial gain special circumstance].

In Mississippi, the narrowing factors and sentencing factors are indistinguishable. The Mississippi aggravating factors (referred to as special circumstances in California) are the *only* factors the jury may consider in deciding whether death is appropriate. See Miss.Code Ann., § 99-19-101(5).

In contrast, California special circumstances are a part of the sentencing considerations through application of factor (a) of section 190.3, but are not the sole basis used by a jury to decide whether a death sentence is appropriate. Indeed, the California Supreme Court has held that it is the *facts* underlying the special circumstances, as opposed to the true finding of circumstances, which is of particular significance to the penalty jury. See, e.g., *People v. Silva*, 45 Cal.3d 604, 632-636, 247 Cal. Rptr. 573, 754 P.2d 1070 (1988) [jury not misled by consideration of three improper special circumstances]. For these reasons, special circumstances have a substantially different impact in California's statutory scheme compared with the aggravating circumstances in Mississippi. California's special circumstances narrow the class of death-eligible defendants while Mississippi's aggravated circumstances both narrow the class *and* determine if death is appropriate. Those found death eligible in California then proceed to a penalty trial where the fact finder determines which of two penalties is appropriate using the Cal. Penal Code § 190.3 criteria.

Federal concerns which relate to an unwarranted conviction or an inadequate narrowing of the death-eligible class cannot properly be interjected into the process by which the jury determined which penalty is appropriate for a concededly death-eligible defendant. See *Ramos*, 463 U.S. at 1009. It is clear that this Court's Eighth Amendment concerns in *Stringer* about the use of aggravating factors which both narrow and determine, if

not presume, death are not present in the California scheme. The discussion in *Stringer* on the use of a vague aggravating factor in the weighing process *Stringer*, 117 L. Ed. 2d at 382 simply emphasizes that a jury whose discretion has not been narrowed in the guilt phase because of an inadequate aggravating factor, cannot satisfy the mandate of *Furman v. Georgia* 408 US. 238 (1972) in the penalty phase by weighing any mitigation against the illusory aggravation.

The requirement of a special circumstance in California, adequately "limits the death sentence to a small subclass of capital-eligible cases." *Pulley v. Harris*, 465 U.S. 37, 53, 79 L. Ed. 2d 29, 104 S. Ct. 871 (1984). Unlike Mississippi, where the finding of an aggravating circumstance alone authorizes death unless the jury finds mitigation outweighs any aggravating circumstance, a special circumstance finding in California creates no presumption that death is appropriate.[6/]

---

6. In California, the jury takes into account 11 statutory factors, if relevant, as well as any non-statutory mitigating evidence presented by the defendant. Cal. Penal Code § 190.3. If the jury concludes that the aggravating factors outweigh the mitigating factors, it returns a sentence of death. If it finds that the mitigating factors outweigh the aggravating factors it returns a sentence of life without possibility of parole. Cal. Penal Code, § 190.3.

There is no presumption that death is appropriate at the sentencing phase. *People v. Andrews*, 49 Cal. 3d 200, 230, 260 Cal. Rptr. 583, 776 P.2d 285 (1989). Apart from the requirement that the state prove prior uncharged criminal activity beyond a reasonable doubt *People v. Robertson*, 33 Cal. 3d 21, 53, 188 Cal.Rptr. 77, 655 P.2d 279 (1982), neither side has any burden of proof with respect to aggravation, mitigation, or the appropriateness of death. *People v. Frierson*, 25 Cal. 3d 142, 180, 158 Cal. Rptr. 281, 599 P.2d 587 (1979).

Moreover, Petitioner's argument that sentencing factors in section 190.3 are subject to independent vagueness analysis was impliedly rejected by this Court in *Zant*. *Zant* noted that a factor which may be defective for purposes of narrowing the class of death-eligible defendants may nevertheless be beyond Eighth Amendment challenge when used to warrant imposition of death on a defendant otherwise determined to be eligible for that penalty. *Zant*, 462 U.S. at 875. In light of *Zant*, California's sentencing factors in section 190.3 are not subject to Eighth Amendment vagueness analysis.

In summary then, the special circumstances in California adequately narrow the death-eligible class, while the statutory aggravating and mitigating factors enumerated in section 190.3 merely provide guidance to the jury regarding information it should consider in determining the appropriate penalty. The vagueness concerns set forth in *Stringer* thus have no application to the factors embodied in Cal. Penal Code section 190.3.

II.

NEITHER THE PROSECUTOR'S ARGUMENT NOR THE JURY INSTRUCTIONS EXACERBATED THE ALLEGED VAGUENESS OF THE STATUTORY SENTENCING FACTORS CONSIDERED BY THE JURY WHICH SELECTED THE DEATH PENALTY

Again for the first time, petitioner now claims that the prosecutor's argument and the jury instructions in this case supposedly exacerbated the alleged vagueness of the 11 sentencing factors listed in Penal Code section 190.3 which the jury relied upon to select the death penalty as the appropriate punishment for petitioner's vicious murder of Ms. Stendal. This claim is not properly before this Court since it was not raised below and lacks merit in any event.

Here, it is true that petitioner did challenge the giving of the then applicable standard jury instruction (CALJIC No. 8.84.2), which lists the 11 sentencing factors to be considered by the jury. It is not true that he did so within the context of a constitutional vagueness challenge. Instead, on his direct appeal, petitioner argued that the giving of CALJIC No. 8.84.2 was improper because this instruction allegedly compelled the jury to select the death penalty if the aggravating circumstances outweigh the mitigating ones. In California, this is referred to as a "Brown" argument in reference to the California Supreme Court's decision in *People v. Brown*, 40 Cal.3d 512 (1985) (rev.d on other grounds in *California v. Brown*, 479 U.S. 538 (1987)) which upheld the validity of section 190.3, while acknowledging that an instruction incorporating the

mandatory language of the section "might mislead jurors as to the scope of their sentencing discretion and responsibility." (*People v. Bonin*, 46 Cal.3d 659, 706 (1988); *People v. Hamilton*, 45 Cal.3d 351, 370 (1988).)

The argument which petitioner now seeks to advance for the first time in these proceedings is also somewhat misleading since petitioner fails to mention that the trial court gave an additional clarifying instruction to supplement CALJIC No. 8.84.2. Opn. p. 62.

Nor did petitioner argue in his direct appeal that the prosecutor's comments or argument at the penalty phase increased or exploited the vagueness of the sentencing factors listed in Penal Code section 190.3. In short, petitioner has only recently decided to raise this claim and his failure to present either aspect of this claim at an earlier opportunity bars consideration now.

Even if this argument is properly before this Court, it still lacks substantive merit and must be dismissed. Thus, petitioner claims that the prosecutor capitalized on the vagueness of the sentencing factors by arguing that the jury could consider the absence of factors traditionally regarded to be either neutral or mitigating as factors in aggravation. This claim was raised in his direct appeal as an assertion of *"Davenport"* error. See *People* v. *Davenport*, 41 Cal.3d 247, 288-

290 (1985). In his direct appeal, petitioner only alleged *Davenport* error as to three sentencing factors.[7]

In this proceeding, petitioner has changed his claim and now alleges that the prosecutor improperly argued that the jury could consider the absence of six neutral or mitigating circumstances as factors in aggravation. Pet. pp. 19-20.

Neither the prosecutor's argument nor the jury instructions were misleading. Here the instructions given in this case implied that the jury's decision as to penalty was not to be automatic or mechanical. The jury twice was informed it had the duty to decide which of the two possible punishments should be imposed, was advised to consider the evidence, the arguments of counsel, and the aggravating and mitigating factors "if applicable," and was told that if a factor was not found to be mitigating, that circumstance did not render it an aggravating factor unless the jury determined it to be aggravating beyond a reasonable doubt. At petitioner's request, the jury was instructed that it was obligated to weigh the sympathetic elements of defendant's background against those which might offend the conscience, and in so doing, it could consider pity, sympathy, and mercy for defendant, but that it could not be governed by conjecture, prejudice, or public opinion. The jury

---

7. In his direct appeal petitioner alleged the prosecutor had committed *Davenport* error with respect to factor (d) the absence of evidence of a mental disturbance; factor (e) the victims lack of consent or participation; and factor (f) lack of any reasonable belief in justification. Opn. p. 56.

also was instructed that petitioner and the prosecution were entitled to the individual opinion of each juror.

Finally, the comments of defense counsel underscored the jury's discretion to decide which penalty was appropriate under the circumstances: counsel advised the jurors that each of them had an independent, singular responsibility to determine the punishment, that it was not a democratic or community effort, and that each would have to live with the verdict. Defense counsel told the jurors to consider and weigh the factors, as they felt appropriate. (See *People v. Grant*, 45 Cal.3d 829, 856-857 (1988); *People v. William*, 44 Cal.3d 1127, 1149 (1988).) Moreover, defense counsel stressed that the most important factor, a factor in mitigation, was the absence of any violence in defendant's past, thereby underscoring the jurors' duty to consider the factors individually.

From the arguments both of the prosecutor and defense counsel, and from the instructions, the jurors in this case clearly understood that they were required to determine the appropriate penalty for petitioner by weighing and considering the enumerated factors. (*People v. Burton*, 48 Cal.3d 843, 873 (1989).) Viewing the instructions and arguments as a whole, the California Supreme Court was properly satisfied there is "no reasonable likelihood that the jury was misled as to the scope of its sentencing responsibility." Opn. p. 66.

III.

THE JURY AT PENALTY PHASE PROPERLY CONSIDERED THE CIRCUMSTANCES OF THE MURDER IN DECIDING WHETHER THE DEATH PENALTY WAS APPROPRIATE

Petitioner argues that the jury, at the second penalty trial which selected death as the appropriate punishment, improperly considered the circumstances of the murder in deciding the appropriate punishment.

To understand this claim, it is necessary to briefly review the proceedings which occurred after the original jury in Shasta County returned its guilty and special circumstance verdicts on December 20, 1982. Following the guilt phase verdicts, the same jury reconvened to consider the penalty phase. The jury heard evidence, arguments and instruction but was unable to reach a verdict and a mistrial was declared for the penalty phase.

At this point, petitioner renewed his change of venue motion asking that the matter be transferred out of Shasta County for retrial of the penalty phase because of the publicity which accompanied the guilt phase verdicts. The trial court granted petitioner's motion, and the case was transferred to Sacramento County for retrial of the penalty phase.

At no point did petitioner object to these proceedings, in fact, just the opposite is true. It is petitioner who requested and received the change of venue to Sacramento County for the penalty phase retrial.

Petitioner notes that his renewed motion for a change of venue was granted, moving the second penalty trial to Sacramento County after the original jury, which heard the guilt phase of his trial in Shasta County, was unable to reach a verdict at the first penalty trial.

Petitioner argues that allowing the jury in the second penalty trial to consider whether the circumstances of the crime (§ 190.3(a)) was an aggravating factor violated his Eighth Amendment rights to a reliable penalty determination.

The California Supreme Court rejected this contention noting that:

> "The United States Supreme Court itself has established that the circumstances surrounding a capital offense constitute one of the criteria upon which the jury *should* base its penalty determination. (See, e.g., *Penry* v. *Lynaugh* (1989) 492 U.S. 302, 318, 106 L.Ed.2d 256, 109 S.Ct. 2934; *Booth* v. *Maryland* (1987) 482 U.S. 496, 502, 96 L.Ed.2d 440, 107 S.Ct. 2529, overruled on other grounds in *Payne* v. *Tennessee* (1991) ___ U.S. ___, 115 L.Ed.2d 720, 111 S.Ct. 2597; *Jurek* v. *Texas* (1976) 428 U.S. 262, 304, 49 L.Ed.2d 944, 96 S.Ct. 2950 (plur. opn.). The high court has not stated or implied that the factor of the "circumstances of the offense" is unconstitutionally vague. (Opn. p. 69.)

With respect to petitioner's claim that section 190.3 is unconstitutional as applied to him because, unlike the typical case where the same jury determines both issues of guilt and penalty, his case afforded the jurors only one opportunity to express their outrage at the crimes he committed, the California Supreme Court specifically found that:

> "Nothing in the evidence, the arguments of counsel, or the instructions supports this assertion. Furthermore, because it was defendant who requested the change of

venue and, by definition, the new jury, he is not in a position to claim prejudice from the granting of his motion. We also note that defendant has provided no authority for the proposition that, when a new penalty jury has been impaneled, the state may not permit the jury to determine the appropriate punishment on the basis of the same criteria that would have applied had a single jury determined both issues of guilt and penalty. Defendant has not provided any basis for us to conclude section 190.3 is unconstitutional." (Opn. p. 70.)

In the instant application for a writ of certiorari, no additional basis for relief has been provided and petitioner's claim therefore still lacks merit.

IV.

EVEN ASSUMING ARGUENDO AN EIGHTH AMENDMENT VAGUENESS ANALYSIS WERE APPROPRIATE HERE, PETITIONER'S VAGUENESS CONTENTIONS ARE MERITLESS

As previously mentioned, petitioner specifically challenges the constitutional vagueness of all 11 factors enumerated in California Penal Code section 190.3. Even if the Eighth Amendment vagueness concerns of *Stringer* have any application to the factors set forth in section 190.3, petitioner's complaints are meritless since these 11 factors are not vague or imprecise.

In the instant case, the prosecutor at the penalty trial acknowledged that factors (b) (lack of a defendant's record of prior violent conduct) and (i) (defendant's age) could arguably be considered to be mitigating factors. In his direct appeal, petitioner conceded that the prosecutor properly argued that the circumstances of the offense (factor (a)) and petitioner's prior conviction (factor (c)) were aggravating factors.

As previously noted, in his automatic appeal petitioner only alleged *Davenport* error with respect to the prosecutor's remarks or arguments regarding three of the factors (i.e., (d), (e), and (f)). Opn., at p. 56.

The California Supreme Court noted that the argument in this case took place *before* its decision in *Davenport* and that defense counsel did not object to this portion of the

prosecutor's argument. The California Supreme Court also held that "it is not reasonably possible that any mischaracterization by the prosecutor could have influenced the sentencing decision of a reasonable jury." Opn., at p. 58.

Petitioner now attempts to claim that the prosecutor improperly argued that six of the statutory sentencing factors (factors (d), (e), (f), (g), (h) and (j)) were either present as aggravating factors or that the absence of a mitigating factor could itself be considered to be a factor in aggravation. This is the first time petitioner has raised this issue within the context of a vagueness challenge nor were three of these factors mentioned in connection with petitioner's *Davenport* claim.

Whether considered separately or as a whole, there is simply no merit to petitioner's vagueness challenge to all of the factors listed in Penal Code section 190.3.

For example, contrary to petitioner's challenge to Penal Code section 190.3(a), this Court has established that the circumstances surrounding a capital offense as one of the criteria upon which a jury *should* base its penalty determination. See e.g., *Penry v. Lynaugh*, 492 U.S. 302, 318, 106 L.Ed.2d 256, 109 S.Ct. 2934 (1989); *Booth v. Maryland*, 482 U.S. 496, 502, 96 L.Ed.2d 440, 107 S.Ct. 2529 (1987), overruled on other grounds, *Payne v. Tennessee*, 501 U.S. ___, 115 L. Ed.2d 720, 111 S.Ct. 2597 (1991); *Jurek v. Texas*, 428 U.S. 262, 274, 49 L.Ed.2d 929, 96 S.Ct. 2950 (1976). Moreover, there is no authority stating or implying that the "circumstances of the

offense" is unconstitutionally vague. *Jurek v. Texas*, 428 U.S. at 274.

Admittedly, the Eighth Amendment mandates an individualized penalty determination. *Eddings v. Oklahoma*, 455 U.S. 104, 110-112, 71 L. Ed. 2d 1, 8-9, 102 S. Ct. 869 (1982). It is also apparent, however, that this mandate for individualized penalty determinations makes it inevitable that sentencers will apply their own values, perceptions and experiences to the factors the state properly deems relevant. *People v. Tuilaepa*, 4 Cal. 4th 569, 594-595, 15 Cal. Rptr. 2d 382, 842 P.2d 1142 (1992).

In one of its most recent opinions, the California Supreme Court has rejected a claim that the sentencing factors set forth in Penal Code section 190.3 are unconstitutionally vague under *Stringer*:

> "We have held that, assuming our statute is subject to the rationale of *Stringer*, factors (a) (circumstances of crimes adjudicated in capital guilt proceeding), (b) (other violent criminal activity), and (i) (defendant's age at time of capital crime) withstand vagueness challenges. Each of these factors `[directs] the sentencer's attention to specific, provable, and commonly understandable facts about the defendant and the capital crime that might bear on his moral culpability. . . .' (*People* v. *Tuilaepa*, *supra*, 4 Cal.4th 569, 595; see also *People* v. *Noguera* (1992) 4 Cal.4th 599, 648-649; *People* v. *Proctor*, *supra*, 4 Cal.4th 499, 550-551.) Similar considerations apply to factor (c) (prior felony convictions), and to factors (d) through (k), which further channel the sentencer's discretion by identifying additional `specific, provable, and commonly understandable facts' about the capital offense and offender which the state properly deems pertinent to the penalty determination.
>
> "Defendant urges that section 190.3 violates *Stringer* because it does not expressly identify which sentencing factors are aggravating and which are

mitigating. We disagree. We have noted that certain of the factors can only be mitigating (e.g., factors (d), (e), (f), (g), (h), and (k)), and we have further concluded that the mitigating nature of these factors is clear even in the face of contrary argument. (See discussion, *ante*, p. _____ [typed maj. opn. pp. 73-75.) The aggravating nature of certain other factors (e.g., factors (b([`other' violent criminal activity], (c) [prior felony convictions]) is equally apparent. Still other factors may allow either aggravating or mitigating consideration, depending on the particular circumstances. However, so long as they focus the sentencer's consideration on `specific, provable, and commonly understandable facts' that properly bear on the appropriate penalty, they cannot be deemed unconstitutionally vague `simply because they leave the sentencer free to evaluate the evidence in accordance with his or her own subjective values.' (*People* v. *Tuilsepa*, *supra*, 4 Cal.4th 569, 595.) Defendant's challenge must be rejected." *People* v. *Montiel*, Slip Opn. filed August 12, 1993, in S004756, Opn. pp. 87-88.

Finally, *Stringer* itself makes it clear that an instruction incorporating a vague factor is subject to harmless-error analysis under the standard enunciated in *Chapman v. California*, 386 U.S. 18, 24, 17 L.Ed.2d 705, 87 S.Ct. 824 (1967). *Stringer*, 117 L.Ed.2d at 383. Moreover, it is a state's high court that must make the harmless error analysis. Where a death sentence has been infected by a vague or otherwise constitutionally invalid aggravating factor, the state appellate court must actually perform a new sentencing calculus, if the sentence is to stand. *Richmond*, 121 L.Ed.2d at 422.

Any possible vagueness in any factor used in petitioner's case was harmless beyond a reasonable doubt. Petitioner's savage attack on Ms. Stendal, his numerous stab wounds to her breasts which were inflicted for no other reason than torture, and her death by strangulation show petitioner to

be a cold-blooded killer deserving of death. See *People v. Payton*, 3 Cal.4th 1050, 1057-1059 (1992). Petitioner is under a judgment of death because of the wanton and vicious nature of his crime. No modification of a jury instruction or clarification of Penal Code section 190.3 would alter the result in his case. Even if petitioner's claim can be stretched to a violation of the Eighth Amendment, petitioner should nevertheless be denied relief.

CONCLUSION

For the foregoing reasons, respondent respectfully requests the Petition for Writ of Certiorari be denied.

Dated: August 19, 1993.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JAN 26 1994
OFFICE OF THE CLERK

No. 93-5161

In The

Supreme Court of the United States

October Term, 1993

WILLIAM ARNOLD PROCTOR,

Petitioner,

v.

CALIFORNIA,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of California

JOINT APPENDIX

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Certiorari Granted December 6, 1993

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12/16/82	Alternate juror sworn; deliberations continue; jury reaches impasse
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7/16/92	Respondent's Supplemental Reply Brief
12/28/82 [sic]	Decision of California Supreme Court
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7/8/93	Petition for certiorari filed
12/6/93	Certiorari granted

(MINUTES – Guilt Phase Verdict and
First Penalty Trial)

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SHASTA**

DEPT. III

#74024
THE PEOPLE OF THE
STATE OF CALIFORNIA,

Plaintiff

vs

WILLIAM ARNOLD
PROCTOR,

Defendant

DA#74024
Minute Book 47
Pgs. 120-120C
December 20, 1982

NATURE OF PROCEEDINGS

JURY TRIAL (Continued)

At 9:10 a.m., all counsel and the defendant, all the jurors and the two alternate jurors again being personally present, Court is again in session.

The Court addresses the jurors and alternate jurors concerning the issues to be considered by the jury in this matter.

At 9:20 a.m., the jury retires to resume deliberations and Court is in recess.

At 2:55 p.m., counsel and defendant, the jurors and alternate jurors again are present.

Mr. Kennedy makes an objection to the Court. The Court overrules the objection.

Mr. Forrester advises the Court the jury has reached a verdict as to the three Counts and presents the Verdict forms to the Bailiff and they are presented to the Court to be read as follows:

(TITLE OF COURT AND CAUSE)

We, the jury, find as follows:

COUNT I – MURDER

~~The defendant is Not Guilty~~

The defendant is Guilty of:

Murder First Degree X

~~Murder Second Degree~~ _____

In the event, and only in the event, you find the defendant guilty of Murder in the First Degree, answer the following:

First Special Circumstance: The allegation that the murder of BONITA BERGH STENDAL was in the First Degree, and was committed by the defendant while he was engaged in the commission of the crime of BURGLARY, is:

TRUE X
~~NOT TRUE~~ _____

Second Special Circumstance: The allegation that the murder of BONITA BERGH STENDAL was in the First Degree, and was committed by the defendant while he was engaged in the commission of the crime of RAPE, is:

TRUE X
~~NOT TRUE~~ _____

Third Special Circumstance: The allegation that the murder of BONITA BERGH STENDAL was committed by the defendant and that the murder was intential [sic] and involved the infliction of torture is:

TRUE	X
~~NOT TRUE~~	

DATED: 12/20/82

/s/ ART L FORRESTER
FOREPERSON

(TITLE OF COURT AND CAUSE)

We, the jury, find as follows:

COUNT II – RAPE

~~The defendant is Not Guilty~~	
The defendant is Guilty	X

In the event, and only in the event, you find the defendant guilty of the above offense, answer the following:

In the commission of the above offense the defendant, with intent to inflict such injury, personally inflicted great bodily injury upon BONITA BERGH STENDAL, to be:

TRUE	X
~~NOT TRUE~~	

DATED: 12/20-82

/s/ ART L. FORRESTER
FOREPERSON

(TITLE OF COURT AND CAUSE)

We, the jury, finds as follows:

COUNT III – BURGLARY

~~The defendant is Not Guilty~~	
The defendant is Guilty of:	
Burglary First Degree	X
~~Burglary Second Degree~~	

In the event, and only in the event, you find the defendant guilty, answer the following:

In the commission of the above offense the defendant, with the intent to inflict such injury, personally inflicted great bodily injury upon BONITA BERGH STENDAL, to be:

TRUE	X
~~NOT TRUE~~	

DATED: 12/20/82

/s/ ART L. FORRESTER
FOREPERSON

The Court polls the jury and the verdicts are unanimous. The Court directs the Clerk to file the Verdicts in the minutes.

The Court addresses the jury regarding the penalty phase of the trial and advises them the penalty phase will commence tomorrow, Tuesday, December 21, 1982 at 9:00 a.m.

The Court admonishes the jurors and the alternate jurors and directs them to return tomorrow at 9:00 a.m.

Court is in recess at 3:30 p.m.

cc: District Attorney
Probation Officer
Sheriff
Public Defender

/s/ J. H. Redmon
J. H. REDMON, Judge of the Superior Court

DA#82F261
Minute Book 47
Pgs 151-151A
December 21, 1982

NATURE OF PROCEEDINGS

JURY TRIAL (Continued)

At 9:20 a.m., all counsel and the defendant, the jury and two alternate jurors again being present, Court is again in session.

The Court addresses the jurors concerning the Penalty Phase of the trial.

Mr. Carlton addresses the Court and presents a Certified Copy of defendant's prior criminal Record at California Youth Authority and it is marked Plaintiff's Exhibit #127 and received into evidence.

Counsel rest.

Counsel present arguments.

The Court reads the instructions to the jury.

At 9:55 a.m., the jury retires to deliberate.

At 11:55 a.m., both counsel, the defendant and the two alternate jurors are present. Counsel stipulate that the jurors may be escorted to lunch, and that they may resume deliberations upon their return without reconvening Court.

At 2:45 p.m., upon a message from the Foreperson Art Forrester, both counsel, the defendant and the two alternate jurors are again present and Court is again in session.

Foreperson Art L. Forrester advises the Court the jurors are deadlocked 11 to 1 and there is no chance for a change in their decision. At this time the Court polls the jurors individually and each one confirms they will not change their vote in this matter. The Court declares a MISTRIAL in this matter. The jurors are thanked and excused by the Court.

The defendant and his counsel waive time for trial setting.

Minute Book: 47
Page: 151-A
Date: Dec. 21, 1982

HON. J. H. REDMON DEPT. III

#74024 PEO v WILLIAM ARNOLD PROCTOR (Continued)

THE COURT ORDERS this matter be continued to Monday, January 10, 1983 at 9:30 a.m. for further proceedings regarding resetting a trial date for the Penalty Phase of the trial.

The defendant remains remanded to the custody of the Sheriff of Shasta County.

cc: District Attorney
Sheriff
Public Defender
Probation Officer

/s/ J. H. Redmon
J. H. REDMON, Judge of the Superior Court

SACRAMENTO COUNTY SUPERIOR COURT

PENALTY PHASE ARGUMENTS

DISTRICT ATTORNEY (PARTIAL).

PEOPLE V. PROCTOR

CASE NUMBER 65383

* * *

[1462] MONDAY, MAY 16, 1983

1:32 P.M.

The matter of the People of the State of California vs. William Arnold Proctor, defendant, Number 65383, came on regularly for hearing on this day in the Superior Court of the State of California, in and for the County of Sacramento, before the Honorable Sheldon H. Grossfeld, Judge, Department Number Five.

The People were represented by Stephen S. Carlton, District Attorney, County of Sahsta [sic], State of California.

The defendant was represented by Stephen C. Kennedy, Deputy Public Defender, County of Shasta, State of California.

The following proceedings were had, to wit:

THE COURT: Good afternoon.

All right. The record will reflect the defendant is present along with respective counsel, the ladies and gentlemen of the jury are all present and in their respective places, as are the alternates.

Mr. Carlton, you may proceed.

MR. CARLTON: Thank you, your Honor.

I essentially discussed the – the law that I think is applicable to the case and now I would like to discuss for a few moments the evidence implicating William Proctor with these crimes.

Before I do that, I would like to read one additional instruction.

> "The fact that William Arnold Proctor has been found guilty of murder in the first degree with special circumstances, and that the special circumstances were found to be true, does not, in and of [1463] itself, constitute an aggravating factor or factors. You must examine the evidence presented to you at the trial and you must be satisfied beyond a reasonable doubt that the defendant, William Arnold Proctor, committed the crimes including the circumstances thereof, before you may determine whether or not the crimes and the circumstances thereof constitute an aggravating factor.
>
> "Reasonable doubt is defined as follows: It is not a mere possible doubt because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge."

So, when you examine the evidence, the evidence of the crimes itself and special circumstnaces [sic] involved, use that standard of proof, proof beyond a reasonable doubt.

Now, in order for – to return a death penalty verdict, defendant has to be found guilty of first degree murder and one or more of the special circumstances. This morning I discussed all the theories of first degree murder and all the special circumstances that have been found to be true. If you disagree with one or more of the theories, that does not mean that a death penalty verdict cannot be returned.

If you disagree with me that there was a burglary on [1464] April 21st, or disagree that the murder was in the course of a rape but you do conclude that the murder was premeditated and deliberated and therefore first degree murder,that's all we have to establish before you can consider the penalty of death in this case.

In addition to that, we have three special circumstances. If you find that the – again, that it was not in the course of a burglary, that it was not in the course of a rape, but that it did involve the infliction of torture, that's all you have to have. You've got the first degree murder and you've got one or more of the special circumstances which would qualify the defendant for the death penalty in this case, and then you would examine the evidence that you find to be true beyond a reasonable doubt and consider whether that evidence are aggravating circumstances and when you evaluate the aggravating and mitigating circumstances.

Now, when I said that we have to prove our case beyond a reasonable doubt, we don't have to prove every single little inference that I've drawn this morning beyond a reasonable doubt. In other words, if you say Carlton, I don't know how you can say that – that the

defendant was smoking a cigarette out there at J-2, that I'm just not convinced beyond a reasonable doubt that he was smoking a cigarette out there at J-2, doesn't mean that our case falls. Means that you – you disagree with that conclusion. But that doesn't mean that we haven't proven our case beyond a reasonable doubt.

When you evaluate each one of these pieces of evidence, it's only when after you consider the entire case that you say [1465] that you do not feel beyond a reasonable doubt that the crime of first degree murder has occurred, not that whether Carlton is all wet on his theory as to how it happened.

And I'd like to look at this point, look at the evidence pointing to the defendant's guilt of these crimes, and for a moment I'd like to look at the evidence without consideration of the print, the other evidence in the case.

All right. Where was the defendant on April 21st, 1982? Remember, on April 23rd he was arrested in Redding and he was talked to by Detective Jarrett and he told Detective Jarrett that he spent the night at home, that the ballgame was on and he wasn't into baseball and so he left shortly after the game went on, went down toward town, would be some place in here, and hitched a ride. And he hitched a ride from an older dude about thirty-five. And the guy was driving a Chevy truck, a green Chevy truck with loud headers on it, and he took him home.

And when he got home he sharpened some knives for his mother and he went to bed around eleven o'clock out of respect for his mother. That's what the defendant said he did.

Ladies and gentlemen, that is a lie. It didn't happen that way. And the reason why I went into some detail, it shows the consciousness on the part of the defendant. There's no mistake about it. This conversation occurred two days after the crime and he just didn't say I spent the night at home and they dropped it. He went into all these details. Got a ride from an older dude. He's consciously telling Detective Jarrett these lies. Got a ride home from an older dude. He was driving a green Chevy pickup with loud headers on it and I sharpened some [1466] knives. All these details.

I got up the next morning about 9:00 o'clock. My mother was watching game shows. All these details he was saying, each and every one of them lies.

Now, the importance of that is that that's a piece of evidence that you can consider. Does it prove beyond a reasonable doubt the defendant committed this crime? No. But it's a piece of evidence that you can consider along with the other evidence.

And you have to ask yourself why did the defendant lie? People don't lie to be lying. Lying is a means to an end. You don't get any particular charge out of telling an untruth unless there's a reason for it. And there's some reason why this defendant lied.

On April 22nd on the telephone at about 12:00 o'clock he's talking to Robert Manley and he tells Manley, "I was walking down towards town by Bernard's," by Bernard's in here, "and my mother picked me up and took me home and I went to sleep right away." Then I asked Manley on the stand, "Did you talk to him? Did you ask him if he watched the game?" "Yes, I asked him.

He said he didn't." "Did you ask him if he watched the movie Jenny?" "Yes." "No, I went right to bed. I was tired. I went right to bed. I didn't watch TV." Again, he's lying.

And he admitted to Detective Jarrett that he was lying there. And what does he tell Detective Jarrett? Says, "I liked to Robert about that. Really I wanted to just get out of the house because they had alcohol there." And he's got some sort of avsion [sic] to alcohol which the evidence really supports.

He's the one that bought the alcohol that they had there. [1467] But he didn't want to be manipulated into staying there because they had alcohol there.

The defendant on April 22nd when he was talking to Robert Manley lied to him.

Okay. Now, did – did the defendant go home that night? Well, he certainly didn't go right home like he said. He didn't come down to Bernard's down here because here is Manley's house and here is Jeff Bohall's house. He left Manley's house at about 8:45 and about ten minutes after 9:00 or so he's at Bohall's house. That's what Bohall said.

He's watching the – the Fall Guy on TV starting at 9:00, ended at 10:00. He came shortly after it started and he left shortly after – before it ended. So he's there about forty-five minutes.

All right. From the time he leaves Bohall's house nobody sees him. Not Ed Proctor, not Julia Proctor, not Mrs. Manley, not Robert Manley. Nobody sees him from

the time he leaves Jeff Bohall's house at ten minutes to 10:00 until 5:30 the next morning right here at P-2.

At 5:30 on April 22nd he's seen walking towards town, which would be down this direction toward Jerry's there. He's seen walking this direction wearing loose-fitting jeans, white socks and sandals. And he's seen there by his own aunt who watches him walk for about a half a block and that's Bill Proctor.

When is he next seen? At 6:00 o'clock in the morning George Stenlund who has known the defendant for five or six years is right here at Jerry's Market and sees him out there in this – some place in this vicinity here using a pay phone.

[1468] He's the one that said he was watching him from two hundred yards away and then when I pointed out to him that was two football fields he then said no, it was probably less then seventy-five. But he saw him in a phone booth.

Then after he makes the call what does the defendant do? He goes to Jerry's and gets change. And George Stenlund is at Jerry's standing twenty feet away from him and he sees the defendant who he's known for several years.

What next? Ed Proctor receives a telephone call from him at 6:30. The defendnat [sic] says, "I need to have mom pick me up. I'm at the Holiday Market." Consistent. Holiday Market is one of these places here. (Indicating.) I'm not sure which, but it's one of these in here. It's right in there. That's the holiday market. That's where the defendant was at 6:30.

Q. Okay. So that right there is some evidence that this defendant is involved. Not proof beyond a reasonable doubt but it's certainly evidence for you to consider and consider with all of the other evidence that we have in the case.

The cigarette butt. Again, that's a piece of evidence for you to consider. That's found at J-2. It's a nonfilter cigarette. And that's what the defendant was smoking.

The scratches on his legs. Now, this – this is unusual to have this. (Indicating.) You don't often – always go around. Doesn't mean that he's involved in a murder but it's unusual to have it.

What's even more unusual is for him to say on April 23rd to Detective Brewer, "I have no idea how I got those scratches or those burns." Had no idea.

[1469] Robert Schauer's testimony. Remember Robert Schauer? He's the one that taught the trucking couse [sic] that the defendant took in February of 1981. It was a month-long course, five days a week, about six hours a day. And he taught him how to tie knots. Taught him how to tie a double halfhitch and a trucker's knot.

And Mr. Schauer also testified that he's been teaching that course for a number of years and that approximately one out of forty to fifty students know how to tie those knots when they first take that course or when they come in at the beginning of the course.

Now, you might know how to tie a trucker's knot. I don't know. But that's the evidence from – from Mr. Schauer.

I'm sure all of you don't. The defendant does. The defendant knows how to tie a trucker's knot and a double halfhitch. And one of those is a double halfhitch and one of them is a trucker's knot. (Indicating.)

People's No. 119, that is the double halfhitch. People's No. 120 is the trucker's knot.

Okay. Then we showed Mr. Schauer People's No. 107. Now, this is one of the sashes that was removed from the hands of the – or the wrists of Bonnie Stendal. And we showed this to him and you recall the testimony that it was cut off so that it preserved the knots. And he looked at it and he found the double – or the trucker's knot, and I believe that's it right there, the trucker's knot. He said that's exactly how you tie a trucker's knot.

Okay. So, looking at that evidence, the defendant's statement of his whereabouts, he was gone from the time he left [1470] Bohall's house to the time that he's seen at – Pallky's house at 5:30 the next day, his statement, the scratches on his knees, all of this is evidence of his involvement in the case.

And then we have the print. And the print, as I indicated, just brings down the curtain on who murdered Bonnie Stendal because the defendant's palm prints are on those books. The defendant was in that house on April 21st and that's when he left those palm prints.

And the defendant was in there after Bonnie Stendal was murdered. He was in there after 8:00 o'clock because she wasn't bleeding before 8:00 o'clock and his prints are in blood.

Now, you remember the testimony of Mike Schaeffer that when they went in there on April 30th back in there and examined the – the bed and started taking the bed apart, that's when they found these books and they were all scattered about, and that he packaged them up according to whether he thought they had blood on them.

Here's People's No. 91. That was underneath the bed.

[1471] MR. CARLTON: People's Number 89 was underneath the bed. And then People's Number 90-A through C, they were underneath the bed. Those are all I'm going to use for this purpose. There was a lot more books under there, A through M, or actually B through M were underneath the bed. But these are the key ones.

All right. Bonnie Stendal, you recall Fran Evans took a blood sample at the autopsy, had type 0, PGM factor 2. And that's her blood.

All right. 103 here, this is the – this is the sample that Fran Evans on April 23rd, which she took from the carpet where the pool of blood was, and it was still damp, and this is the area that she took it from, and that blood is type 0, PGM factor 2.

All right, 91-A. All right, 91-A, that had blood on it, and that had blood on it PGM factor 2, type 0, the same blood as Bonnie Stendal's, right down to the PGM factor and the type. Type 0, PGM factor 2, which two to three percent of the people have.

All right. Now, this also, I want to be careful and read my notes, make sure I don't make a mistake on which books had which. This had a palm print, the right

palm print of the defendant. So the defendant touched this with his right palm.

Now, this is a print that was lifted, where they put the subtance on it and actually lift the print off of it, and you can still see the black substance or something that was used to lift the print.

[1472] All right. 90-A had human blood, PGM factor 2, and it had the right palm print of the defendant. Okay. So he placed his right palm on that particular book.

People's Number 89, that had the right palm print of the defendant, and that was analyzed by Fran Evans as being human blood that was on it.

Now, People's Number 89 is different from the other books, as far as the print is concerned. The print is from the oils on the other books. The print on People's Number 89 is actually in blood.

And you can see the print, if you look in the jury-room at People's Number 89, you'll see the print right on there. It's still on there. And you'll see that. And what you see on there is Bonnie Stendal's blood.

That has not been lifted. Nothing has been done to People's Number 89-A. Marty Collins just took a magnifying glass and read that and compared it as it was when it was delivered to him by Ken Myers. That is still her blood. No processing was done to People's Number 89.

Now, further, you remember the stipulation from Marty Collins. Further, on People's Number 89, that blood was on his hand and then his hand was placed on the book. It wasn't that there was blood on the book and somebody came in contact with it, the blood was on his

hand and then and of course, the blood is wet, otherwise you wouldn't have the transfer, so he's got her wet blood on his right palm and then he comes into contact with People's Number 89.

Now, as indicated, the defense has stipulated to all [1473] that, there's no issue in that, that's why you didn't hear the testimony of Marty Collins. They haven't stipulated that's what he said, they've stipulated that that in fact is what happened. That the defendant, while he had her blood on his hand, grabbed a hold of that book and left his palm there, and what you see on People's 89 is actually her blood.

People's Number 90-B, "Getting What You Go After," a print was lifted off of that, and that is a palm print. Now, this is different, it wasn't in blood, it was – they used the chemical substance to lift it off and the defendant's left palm is on People's Number 90-B.

So that, you take those prints and then it puts pretty much in perspective the other evidence that we've had. Shows you why the defendant lied. Gives some reason to why he lied to Robert Manley on April 22nd, why he lied to Detective Jarrett on April 21st. Explains where he was from the time he left Jeff Bohall's until he was seen by his aunt. Puts all these things in perspective. There's no question about it that he was in that house.

Okay. Now, I've gone over essentially the evidence and the crimes involved. Now I want to discuss with you a little bit in closing the instructions concerning the aggravating and mitigating factors.

> "It is now your duty to determine which of the two penalties, death or confinement in the state

> prison for life without possibility of parole, shall be imposed upon the defendant. After having heard all the evidence and after [1474] having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed. If you conclude that the aggravating factors outweigh the mitigating circumstances, you shall impose a sentence of death. However, if you determine that the mitigating circumstances outweigh the aggravating circumstances, you shall impose a sentence of confinement in the state prison for life without possibility of parole. Before you may consider a particular aggravating circumstance to be true, you must be satisfied of the existence of that aggravating circumstance beyond a reasonable doubt."

So if you conclude that the aggravating circumstances outweigh the mitigating circumstances, you are obligated to return a verdict of death.

And we spent a considerable amount of time on voir dire on this issue, and you indicated that if that was the case, that would be your verdict. And I'm not suggesting that this is an easy experience for you, but I think that we have reached that point. I believe in the jury system and I know you're going to be fair and return the verdict that you think is just in this case.

So I'd like to at this time go over the factors that [1475] you will have to consider and see where they fall in this particular case.

> "In determining which penalty is to be imposed on the defendant, you shall consider all of the

evidence which has been received during any part of the trial of this case, except as you have been instructed in the course of this phase of the trial. You shall consider, take into account and be guided by the following factors, if applicable. A, the circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance or circumstances found to be true. The presence or absence of criminal activity by the defendant which involve the use or attempted use of force or violence or the expressed or implied threat to use force or violence. The presence or absence of any prior felony conviction. Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance. Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act. Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral [1476] justification or extenuation of his conduct. Whether or not the defendant acted under extreme duress or under the substantial domination of another person. Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or mental defect or the effects of intoxication. The age of the defendant at the time of the crime. Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor. Any other circumstance which extenuates the gravity of the crime, even though it is not a legal

excuse for the crime, including but not limited to the defendant's character, background, history, mental condition, and physical condition."

Okay. Before I close, I would like to go over those factors, and I submit to you that in looking over those factors, there are only two mitigating circumstances and the rest in this case are aggravating.

The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance or circumstances found to be true. That's the case itself. That's this (indicating). [1477] And I submit all you have to do is take a look at People's Number 63 and that's an aggravating circumstance.

This was a brutal murder, and I'm not trying to be emotional. This was a brutal murder.

Then the other special circumstance, the torture, the fact torture was involved. That is the crux of the case, it's the case itself and the circumstances. And that's what makes this case so aggravating is the killing itself, the manner in which she was killed, the punishment and pain he administered on Bonnie Stendal.

Okay. Factor number two, the presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence.

This is a mitigating circumstance. There was no evidence offered by the People of any prior activity of violence on the part of the defendant. That is a mitigating circumstance.

The presence or absence of any prior felony conviction. That is an aggravating circumstance. The defendant has two burglary convictions, one in 1980, one in 1981, and an auto theft, which is part of, in 1981, which actually was part of the 1981 burglary. That is a circumstance in aggravation.

Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance. I submit he was not under the influence of mental or emotional disturbance.

There was no evidence that he had any kind of a mental derangement, other than what anybody who would do that would [1478] have. And the evidence was that he, again, that he was rational at the time of this offense, that he knew what he was doing, he knew it was wrong, that's why he cleaned up and that's why he took precautions not to get caught.

That's why he lied to Detective Jarrett, why he talked to Manley or lied to Manley. He was acting rationally. That's why he washed his clothes the next day. He didn't want to get caught. He knew what he was doing. That is a circumstance in aggravation.

Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act. Obviously Bonnie Stendal did not consent. We don't have to spend much time on that one. That clearly is a circumstance in aggravation.

Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation of his conduct. I

don't know if the defendant thought it was – that he was morally justified in it, but I certainly know he wasn't reasonably morally justified in doing it.

Clearly there was no moral justification for what was done to Bonnie Stendal. That again is a circumstance in aggravation.

Whether or not the defendant acted under extreme duress or under the substantial domination of another person. There was no other person involved in this offense. Bill Proctor killed Bonnie Stendal by himself, and all the evidence in this case shows that.

[1479] Now, I don't know, again, I'm anticipating a little bit, I don't know what Mr. Kennedy is going to say on that. Whether he's going to say that Manley was an accomplice of his, but I'll get to that in a moment.

The age – excuse me, I missed one.

Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or mental defect or the effects of intoxication. There is absolutely no evidence again that he was under – that he was impaired by mental disease.

And again, the evidence of intoxication shows that he had three drinks, and that he knew what was going on when he committed these acts.

The age of the defendant at the time of the crime. I submit that is the second and the last mitigating circumstance. The defendant was twenty at the time the act was committed.

So there are two mitigating circumstances.

Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

I want to read for a moment the accomplice instruction.

> "An accomplice is one who is subject to consideration for the identical offense charged against the defendant on trial. To be an accomplice, a person must have aided, promoted, encouraged, or instigated by act or advice [1480] the commission of such offense with knowledge of the unlawful purpose of the person who committed the offense."

All right. Now, going back here, reading this one again, whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor. I suggest that there is no evidence that he was an accomplice. He was not only involved heavily, he was the only one involved in it.

Remember, again, People's Number 89. The defendant's palm print on her blood, while her blood was wet. He was involved in it. There was nobody else involved.

Robert Manley was home. We went to great extent to show that. He said that he watched the movie Jenny. We showed what time the movie came on, about 12:45, and ended at 2:45 or something at night.

He said he watched it, he told you who was in it. He said he watched the ball game, all of the ball game, and his mother came home and said he was watching the game when she was there.

Robert Manley was not involved in this offense. The other things that he testified to that are supported by the evidence. The defendant, he said the defendant left ten minutes after the game came on, the defendant said he did. And the defendant got over to Jeff Bohall's, the defendant was by himself, Robert Manley wasn't with him.

At 5:30 on the 22nd, when he's out in front of Mrs. Palkki's, house, Robert Manley wasn't with him. The defendant was there [1481] alone and committed this crime alone and nobody helped him.

All right. Any other circumstance, this is the last one. Any other circumstances which extenuates the gravity of the crime, even though it is not a legal excuse for the crime, including but not limited to the defendant's character, background, history, mental condition and physical condition.

Now, I submit that there is nothing that has been presented to you that would extenuate this crime. There's nothing about the defendant's background that you heard that would extenuate this crime.

According to his aunt, he was a normal, average boy growing up, and his mother said that, essentially, as I recall. The only thing you know about his background is that he's had a little history in burglary, takes things that don't belong to him, and he is a violent person. That's what you know about his background. To me, that is not extenuating circumstances.

Again, his mental condition. There is no evidence that he was suffering from any sort of mental defect, and his physical condition apparently is not bad.

One further instructin [sic], and then I'm going to close.

> "In determining the question of the penalty to be imposed upon William Arnold Proctor, you shall weigh the sympathetic elements of his background against those that may offend the conscience. In so doing, you may consider pity, sympathy, and mercy for the defendant. However, you may not be governed by conjecture, [1482] prejudice, or public opinion."

That instruction says in so doing, you may consider pity, sympathy and mercy for the defendant. Doesn't say you shall. That you shall take that into consideration, if there is any basis for sympathy.

And let me suggest that in this case, there is no basis for sympathy for William Proctor. This is what he does on April 21st, 1982. That's what he does on April 21st. On April 22nd, what's he do? He shows absolutely no remorse.

MR. KENNEDY: Objection, your Honor.

THE COURT: The objection is sustained.

MR. CARLTON: Well, I'm going to go into what he did on the 22nd.

THE COURT: All right.

MR. CARLTON: What does he do on the 22nd? He goes about his business like nothing happened. He

goes to Redding. He goes with Bob Manley. And they go there for the purpose of having fun.

[1483] The defendant spent April 22nd, 1982, having fun, less than twenty-four hours after he did that, and I submit there is no basis for sympathy for William Proctor in this case.

Now, I know, or I'm again anticipating that Mr. Kennedy is going to suggest to you that today is the most important day in his client's life, and he's going to ask for your sympathy. Well, let me suggest to you that today is not the most important day in his client's life. The most important day in Bill Proctor's life was April 21st, 1982. The most important time was when he was outside of this room at J-2 smoking that cigarette. That was the most important moment in Bill Proctor's life and everything that followed that is inevitable.

Anybody knows that if you viciously kill somebody you're going to be sitting right over there. And at that point while he's smoking that cigarette he had a choice. He could either turn around and walk away and Bonnie Stendal would be alive and we wouldn't be gathered here today. But once he made that choice everything is inevitable, and the most important time is when he was out in front of that bedroom.

Now, if you've got the impression that – that I'm callous about this, believe me, I'm not. I know that this is an important, awesome responsibility that you have. And believe you me I'm not here because I want to be. There are lots of places I'd rather be than here.

But I suggest to you that I'm here because it's necessary, and I'm asking you in this case to return a death verdict not because you want to but because under the law of California it's necessary. Thank you.

[1484] THE COURT: I think what we'll do is rather than proceed at this time we'll take a short recess to give – so we won't have to interrupt your argument, Mr. Kennedy.

We'll reconvene at 3:30, ladies and gentlemen. Again, I call to your attention the admonition heretofore given to you your duty not to converse among yourselves or with anyone else on any subject connected with this trial, nor shall you permit anyone else to speak to you on any subject connected with this trial, nor shall you form or express any opinion thereon until the matter is, in fact, finally submitted to you.

Please return at 3:30.

Mr. Burruel, did you have a problem?

JUROR BURRUEL: Did I hear you say 3:30?

THE COURT: 2:30. Excuse me. Can't see the clock up there. 2:30.

(Recess.)

(The following proceedings were had in open court out of the presence of the jury:)

THE COURT: All right. The record will reflect the defendant is present along with respective counsel, we're outside the presence of the jury and the alternates.

Either counsel wish to be heard?

MR. KENNEDY: Yes, I do, your Honor.

What I heard toward the conclusion of Mr. Carlton's argument was that he mentioned the word "remorse" to which I objected, and then he thereafter went and characterized remorse in a more graphic detail. And I think the jury should be instructed that remorse is not a statutory grounds for [1485] aggravation in this case.

THE COURT: The Court has instructed the jury as to the law and the Court will do so. He did not indicate that the remorse was an aggravating – a ground for aggravation. Under the reasonable interpretation of his comments, the jury was in response to the arguments against sympathy, under those circumstances the Court does not intend to give any further instructions with respect to remorse.

The Court sustained the objection because it was a conclusion. However, the testimony – I beg your pardon, his argument was consistent with what the evidence was introduced as to the conduct of Mr. Proctor which is uncontradicted at this time. Under those circumstances the objection is overruled. Your request is denied.

MR. KENNEDY: Thank you.

THE COURT: Mr. Carlton, you wish to be heard?

MR. CARLTON: No, your Honor.

THE COURT: Anything further, Mr. Kennedy?

MR. KENNEDY: No thank you.

THE COURT: We'll reconvene at 3:30.

(Recess.)

(The following proceedings were had in open court in the presence of the jury:)

THE COURT: All right. The record will reflect the defendant is present along with respective counsel, the ladies and gentlemen of the jury are all present and in their respective places, as are the alternates.

Mr. Kennedy?

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* * *

FENALTY PHASE ARGUMENTS

DEFENSE ARGUMENT (COMPLETE)

[1486] MR. KENNEDY: Thank you, your Honor.

Counsel, ladies and gentlemen of the jury, you are a jury and I thought the first thing we ought to talk about is what is a jury. There's an instruction that should help guide you in that.

> 'Both the People and the defendant are entitled to the individual opinion of each juror. It is the duty of each of you to consider the evidence for the purpose of arriving at a verdict if you can do so.
>
> 'Each of you must decide the case for yourself but should do ~~so~~ only after a discussion of the evidence and instructions with the other jurors. You should not hesitate to change your opinion if you are convinced it is erroneous. However, you should not be influenced to decide any question in a particular way because of a majority of the jurors or any of them favor such a decision.'

Now, what that should tell each of you is that each of you is a judge and you have a responsibility on the one hand to discuss and communicate with your fellow jurors, but on the other hand you have an independent responsibility in the eyes of the law and you can, each one of you, each one of you can think of yourselves as the judge of this case anyway of William Arnold Proctor.

So, it's not a committee. You may be taking votes back in the jury room but that doesn't make it a democracy. Each one of you has a singular responsibility and regardless of what verdict is here today, of course, each one of you are going to [1487] have to live with that, but more importantly I think it's important in the conduct of how you deliberate, that is what is it that you do and what is it that you say back in the jury room.

You won't get any instructions on that. You get to guide yourself pretty much on how you want to communicate inside that jury room. But I want you to keep in mind and the first thing I want to tell you is that it's up to each one of you individually. It's not a community effort.

Each of you have to consider this individually because the law requires it and, of course, that's the most important duty, I suppose. But secondly, that each of you must consider these items that we get an independent view of this evidence.

And what are we doing in real life? We're getting away from the mob mentality; okay? People can do things together that they can't do singly, that they can't do – I mean twelve people can do something that one person wouldn't or wouldn't even think of doing.

And so we think with this number of people that we can filter out those elements and come to a decision based upon reason, based upon logic, not based upon emotion.

You know Mr. Carlton's gone to great lengths to show you blood and guts. Now, why would he do that? He wants to get that passion going. He wants that mob

mentality to surface. Obviously wants everyone to act orderly but that's his purpose and I understand that.

But that's why these pictures are here. They have very little evidentiary value by themselves. If you want to talk what's the first thing I see is a scraped knee. We can look at [1488] a scraped knee. We've all had them. I mean, there's no purpose to have that picture there other than to show some blood on the picture.

That's what we're trying to get away from. I not only don't want you to use sympathy, I insist that you don't. We want this case to be decided on the evidence exclusively and very particularly.

And in that regard, I think I can tell you how you will arrive at your verdict. If you consider the facts and events that have been presented here before you in a general fashion, if you pick them out in a disorderly way or in ways that appeal to you, the evidence that you remember the best, you are going to give him the death penalty. On the other hand, if you look at this evidence and you examine it particularly and show where it goes consistent with these instructions, you'll come in with a verdict of life in prison without the possibility of parole.

And I'm confident if we speak after this – after this tirbunal [sic] is concluded, that that's how you are going to make that decision. And let me give you some examples.

I'll be giving you examples. That's actually the theme of what I'm here to talk about today is how we're going to look at this evidence.

First of all, let's – who introduced the evidence? Most of the evidence was introduced by Mr. Carlton. He has the privilege of going first in this particular case. Much of the evidence that he introduced I would have introduced, but since he brought it in first I get to – I always think of it as piggybacking along with him and ask questions which will solicit [1489] the information that I think is important to you even though he may have called that person to the witness stand.

Some of this evidence is exculpatory and I certainly would have introduced it during my part of the case.

He gets to go first. That's why it appears that way.

Now, in exchange for that I get to go last in argument. And so there's really no – no basic unfairness in comparing the two opponents here.

What we're talking about is the particularity of the evidence. Well, I'm going to give you examples and I think all the way through my talk there are going to be examples of this particular theme.

Example number one. Where was Bill Proctor the night of April 21st, the morning of April 22nd? Mr. Carlton asked that question and he said well, we know he was here and we know he was there.

Well, that's okay. Some of that was true. I disagree factually, I think, with what he said and I'll get to that a little bit later, but the most important thing about that is that the defendnat [sic] didn't testify.

And the problem, and let me read the instruction that the judge will read to you about that.

'It is a constitutional right of a defendant in a criminal trial that he may not be compelled to testify.

'You must not draw any inference from the fact that he does not testify. Further, you must neither discuss this matter nor permit it to enter [1490] into your deliberations in any way.'

No, this is a bit dicey it appears to me. If we're going to talk about if Mr. Carlton is going to argue that we have some burden to tell you something, that is contrary to this instruction That's exactly what we're not required to do.

So, while it may be – it may appear to be an effective argument, if you look at it particularly it is quite unfair to the defendant because the law requires that you not consider the fact that he has not testified.

While I'm on that subject, I want to cover it right away, that is something that attorneys and clients talk about in almost every case, and it's a decision that's made based upon a myriad of factors.

Each case is a little bit different. I would like each of you to know that I participated heavily in that and I participated in the decision making. I don't think I can tell you much more about that, but if you find some gut reaction, you know, that sticks in your craw because he did not testify, please blame it on me, not him. I'm the one that's supposed to be the smarter of the two and supposed to have more acumen in that area, and I felt it was best.

And that's about all I think I should say about that under the circumstances.

The defendant may and has relied upon the state of the evidence. That's another instruction.

'In deciding whether or not to testify, the defendant may choose to rely on the state of the evidence and upon the failure, if any, of the People [1491] to prove beyond a reasonable doubt the existence of every factor determined by you to be an aggravating factor, and no lack of testimony on defendant's part will supply a failure of proof by the People so as to support a finding against him on any such factor.'

Now, what I'm trying to do is I'm trying to focus very particularly on that evidence, on the People's evidence. I have the right to – to make him prove this to your satisfaction, and that's what I'm demanding that he do, and that's what I'm saying I don't think he did. And I'll explain why later but that's our right. That is the theory of this defense.

If the defendant doesn't testify, that's because our theory is inconsistent with what – with him testifying in this matter at all.

So, let me – first of all, I was paying attention or I hope I was this morning and waiting for Mr. Carlton to start talking about aggravation and mitigation because that's really what we're talking about. In making your decision today the instruction says, and I'm sure you'll read it, weighing circumstances in mitigation and aggravation. And those two, neither one of those words were used before lunchtime so that, I think, may serve to illustrate part of what I'm talking about.

We have a dichotomy. On the one hand this person's been convicted. On the other hand you have to make a

decision whether that conviction was worthwhile or not. You have to find that your verdict is consistent with one that has gone before it. And that's why it was really necessary for Mr. Carlton to talk about the very foundation of this case.

[1492] And there we're talking about first degree murder. We're talking about his four theories. Okay? Rape, burglary and torture.

Now, on top of that if you can get past this hurdle, then we get into the special circumstances. There are three of those. That is the burg – burglary, the rape and torture.

Now, if you can get through those and say yes, that – that young man did it, then you get to where the decision is being made. X marks the spot. That's what this case is all about.

All right. These are the foundation upon what this decision making process will be. Right in here. And it's very simple. There aren't many instructions about that.

But keep in mind that when we're talking about these things, you have to satisfy yourselves, each one of you individually has to satisfy yourself as to the existence of these, the truth of them or any one of them as you go along in order to even discuss the issue for which this tribunal was called.

This is the procedure. At least this is the way I think about the procedure and that I conceive of this procedure here today, and it – it is a little bit convoluted but I think the more you work with it the more you'll understand what it is and why it operates this way.

Let me start at the beginning. I'm not going to argue about first degree murder. I'm not going to argue about – well, I will argue about torture but let's just take first degree murder for example.

Ask yourself what item of evidence tells me this was [1493] deliberate. And by that we mean deliberated. Doesn't mean that you intend to do it but what it means is you think about it.

What? I don't know. A cigarette butt I think, perhaps -if I look around in this case and I've been acquainted with it almost as long as Mr. Carlton, I can't find anything that tells me that.

Okay. Now, there are any number of ways that it could be told, I suppose. I just don't know what they are. If you think well, a guy wouldn't do this if he didn't think about it ahead of time, that''s not evidence. That's an inference supported with no fact at all. And that's what we're talking about or what I'm talking about when I talk about particularity.

Okay. You think it's true. Why do you think it's true? What fact indicates that? What testimony did you hear? What item of physical evidence tells you that that is true?

Deliberation. I don't know. I do know one thing about deliberation and first degree murder, and that is cleaning up afterwards is not a part of it. Not a part of it in any way, shape or form. Because you've – you will get the instructions on the concurrence of act and intent.

So that a first degree murder is either completed or it fails at the time that the assault or however it's accomplished is done. What you do the next day or five minutes later is not important in the eyes of the law in terms of determining mental state for first degree murder.

Okay. That means I've got to form the intent ahead of time, then I've got to go ahead and act and as soon as that act is completed, and I reach a safe place, then the crime's over with. [1494] I can't consider or you can't consider what goes on. That's what the concurrence of act and intent is.

There are crucial things that separate certain crimes – certain kinds of crimes. Mr. Carlton touched on burglary. At the time that you enter a building you got to have some felonious intent. Those two things have to join together before that crime was committed.

That's what we're talking about when we're talking about deliberation, premeditation, et cetera, et cetera, et cetera.

Now, let's talk about burden of proof just briefly. These two have to be proved beyond a reasonable doubt. So when you examining these and you are going to necessarily examine them twice, that's the standard that you are to apply to those two boxes. That's everything that appears in here. This is a weighing process. And there's a different standard of proof as the judge will instruct you.

So, in examining these things, let's look at – let's look at a burglary. Now, I – my personal belief is the burglary that's mentioned at this juncture and the burglary that's

mentioned here are the same. They're not only the same burglary but also they're the same elements that go into it. The same require – general requirements, so that when you are examining them you don't have to do it twice perhaps. The burglary.

Okay. Mr. Manley or Mr. Proctor or Mr. X had to enter that residence with the intent of doing something felonious in there, specifically rape. Okay.

Now, breaking and entering, that's part of it, but they [1495] have to have that requisite intent. Now, what – what fact tells you that that intent exists? The cigarette butt. That seems to be so crucial to somebody for some reason. The cigarette butt is surmised that – that someone was out there smoking and looking through this window and developed an intent to do something felonious.

That is just a supposition. There isn't one fact that supports that. There isn't a fact to tell you how long that long that cigarette butt was there. Matter of fact, it didn't even say Camel. It was just an unfiltered cigarette.

I remember I asked about whether it was wet or not and yeah, it was wet but we didn't get into weather and certainly no weather was proved as to whether that narrows it down in time at all. That cigarette could have – butt could have been there for one minute, it could have been personnel that investigated the scene. There's nothing specific about that cigarette butt that narrows it down, that helps us. There's nothing particular about it. There's nothing onerous about it at all.

Perhaps some of us don't smoke but aside from that there's nothing onerous. So, I don't know how you conclude that somebody had any intent upon entering that building.

I don't know. I can't find a fact in my own mind that would help me support that and I'm trying to do it. I'm trying to anticipate what it is that you are going to do in the jury room. I just can't think of one.

You notice that the intent has to be rape too, and again, I guess this is because of the – because of the condition of the living room. There again, that's just a – that's just a [1496] supposition. We don't know that Mrs. Stendal or anyone was lying down on that couch on April 21st or April 22nd or that she was lying there when a person was standing outside the window smoking a cigarette. We don't know any of these things. We suppose them. We're supposing them without a fact to support them.

Okay. Dena Humble says, 'Oh, I was in her house yesterday and that wasn't there.' Well, that tells you something; it's been moved. It doesn't tell you Mrs. Stendal moved it. Doesn't tell you a lot of things. But it helps narrow down the – the possibilities here.

But keep that in mind as we go all the way through here.

Rape. There's not a lot I want to say about rape because there isn't a lot of evidence about rape. It is seen or perceived by the prosecution as the motive for this crime, again, for reasons that particularly escape me. I

don't know why that has to be the motive and theft wasn't the motive. I don't know why those things exist.

I think the motive depends largely on who it was that was in there and that – at the time, at the relevant time, and we'll talk about that later.

But if you will remember Dr. Stephens' testimony about rape, he was talking about there's an injury inside the vagina that was caused by either a foreign object or a penis. He didn't know which one. If he had to choose one he would choose a penis.

Now, that has to add up to the fact that a rape was committed; okay? The doctor isn't sure. I mean, there are other laws that cover other kinds of conduct which could have been [1497] charged in this case, but this is the one they chose and we were lucky enough to hear just exactly why they chose it and how they chose it.

MR. CARLTON: Your Honor, I'm going to object to this.

THE COURT: The objection is sustained.

MR. CARLTON: I think it misstates --

THE COURT: The objection is sustained. Proceed.

MR. KENNEDY: The – the – there is no other evidence which supports any conclusion that that crime even existed, that it even occurred.

Damage inside a vagina can be caused by any number of things and you are asked to believe beyond a reasonable doubt that it occurred, not only I'm not talking about who did it or how it occurred or consent or any

of those other things, just did it occur. Was it an unlawful event? I think so but I'm certainly not convinced beyond a reasonable doubt.

[1498] MR. KENNEDY: Torture is the one that is going to give me the most difficulty, because it also includes some of the legal nuance that is peculiar to this case.

Torture, at this level, is defined as causing cruel pain. That's the phrase I always remember, cruel pain. Torture here is defined differently. There are different requirements for this one.

So I will assume that the person or persons who punctured the chest and who scratched the knife across the neck of Mrs. Stendal tortured her. I will assume, I can think of no other reason to do that, I can conceive of some, but I'm just going to give that matter away for now. I think it's more illustrative if we look at it that way, we'll just put that in our pocket and assume that exists.

This torture has to do with extreme pain. And again, going back to Dr. Stephens' testimony, what he said was that the injuries around the chest, cutting of the neck, was not extreme pain, was not severe pain, I think is the word that he used, and that essentially became translated to extreme. That the extreme portion of the pain that she suffered, if any, was done to the injuries around the neck, so much damage that that is where the supreme – the extreme pain occurred.

That – that's my memory of the testimony, that is how she was killed. That is the reason for her death. So that if we conclude that the perpetrator of this crime

strangled this person, that is a conviction of murder, perhaps, certainly homicide, it's a homicide, it's a murder, but it's not torture. The purpose of that is death.

[1499] Do you see how they work off against one another? This requires an intent to kill. Well, the intent to kill and the intent to cause extreme pain merge into one another at this juncture, and I don't know how legally you can find this special circumstance torture to be true.

I don't think the law provides for it with the evidence that we had from Dr. Stephens. I want to underline that testimony, because the answers were given upon questioning by the judge. And it's my belief, anyway, as to why those questions were asked, and I was going to ask them, too. So the idea is that you fail at this point.

There's another thing I'd like to say about torture before I leave it, essentially forever. The law does not require that a person perceive this pain. You and I think of torture as, you know, inflicting pain. All right. And we usually think of it in terms of, oh, I don't know, I – looking at my children, sometimes I think they are torturous. But the idea that I always think of when I think of torture is war time, prisoners of war, doing things which cause pain to get people to do other things.

That's a classic kind of torture. They are conscious, you are controlling them by the use of this pain. I think that's the common conception of what torture is.

But the law doesn't agree with that common conception. The law says this person can be completely unconscious and it would not make any difference. If you feel you can get beyond this point and you get to X marks the

spot, you get to weighing things, and you're weighing torture, keep that [1500] in mind. Because I think that's the important distinction that the law is trying to make for you.

You are asked, if you even arrive there, you are asked to weigh circumstances in aggravation and mitigation and compare that with torture. Well, what are we talking about? We're talking about a good torture versus a bad torture? A painless versus a painful torture?

These concepts are something that I know we don't like to talk about, and we don't like to be confronted with, but I think the law requires us to do that.

So when you're asking torture, if you can get beyond this point, and I don't believe you can, but if you feel that you can, then we get here and we get to – we have to weigh that off against other circumstances.

And I think that being conscious is the circumstance that is the most consequential in this arena. If Mrs. Stendal was conscious, fully conscious, when these injuries took place, it's an aggravated torture. If she was not conscious, it's a mitigating torture.

Whose responsibility is it to prove whether Mrs. Stendal was conscious? The prosecutor. That is his duty. And he cannot do it.

That's why those questions were asked, exactly for that reason, because I think when we get here, no matter what, as terrible as the idea of torture is, the legal definition does not correspond with what I think we commonly conceive of.

But using torture as an example, that is the procedure [1501] that the Court and the law of California is asking you to apply.

Now, you don't have unfettered authority when you get to weighing the circumstances in aggravation and mitigation. You're going to be given some direction and you are only to consider the statutory factors of aggravation and mitigation, and you may feel that a factor is important. I wish I knew that. You know, I will have to guess at what that might be. But that is what you are not to consider. The law says we have to be particular here. And that's why the lists are enumerated.

We can all think that there's things that maybe ought to be off the list that are on and things that maybe ought to be on that are off it, but we are stuck with the law, as Mr. Carlton said several weeks ago, and that's what it pertains to.

So you have to confine yourself to the statutory factors that are enumerated.

Going back to my theme of particularity versus general, let's talk about the identity of this assailant. Inevitably I have to talk about that. We have circumstantial evidence, that's been defined to you, and it's been read by Mr. Carlton, and I think you understand what that is.

There is something that you have to supply. I disagree with Mr. Carlton, circumstantial evidence isn't nearly as good as direct evidence. You're going to get several pages of instructions on how you are to view circumstantial evidence, and you're going to get virtually none on how you view direct [1502] evidence. The reason

for the rules is that's where the fear is. That's where the problems are.

If a mistake's going to be made, it's going to be made because of the value of that evidence, and so you are to look upon it with some caution.

Now, I'm not going to sit up here and say Mr. Proctor wasn't involved in this case or in this trial. I think that's a mistake and I'm sure it's not true. The print that we've talked about, I very much want to talk about that print. We've admitted that Mr. Proctor what have we admitted? You've been told he's been convicted of first degree murder, it's not a big revelation to you.

That is Mr. Proctor's palm print. Now, that one item of evidence on People's 89-A, I believe it is, I think is the most damning single piece of evidence I have ever seen. I mean, if you had to get one item of physical evidence to indicate a crime, that a crime was committed, and the identity of somebody who might be involved in that crime, they've got it, it's around here somewhere, it was on the floor last time I saw it. But it's here.

I'm not going to ignore that fact. I want you to look at it, I want you to think about it. I don't want you just to assume that Mr. Proctor did all these things because his fingerprint appeared in the house of Bonnie Stendal, because that's not looking at this case with particularity, with clarity. Doesn't make it any clearer, makes it a lot foggier.

Other things about that fingerprint evidence that was interesting was the identity of the fingerprints that were [1503] lifted at the scene all together. If you'll recall, there

were two fingerprints of Mrs. Stendal, one of Mr. Bishop, another police kind of personnel, and then several of William Proctor.

The thing that was remarkable about that to me is we have a house that Bonnie Stendal has lived in for years and years and years and years, and only two of her fingerprints are in her own home.

Now, that is kind of a curious fact, it seems to me, and it's curious because it shows you how unreliable fingerprint evidence can be. I'm sure we'd all assume there would be hundreds, maybe thousands of fingerprints in our own homes, in those homes, but that isn't the case. We have an easy illustration of the fact that that's not the case.

So if you say, well, since Manley's fingerprints weren't in that house, he couldn't have been there, that's a failure of logic, because fingerprints just aren't left every day. You can be in a house for years and only leave two.

So that's that's a unique item of that, or a unique component of the fingerprint evidence all together. The lack of a fingerprint doesn't prove anything. The inclusion of a fingerprint proves that person touched that item, okay, at some time. And that's all it proves.

Let's look at the fingerprint with particularity. The fingerprint was made, on 89-A was made in blood. Type O, PGM factor 2. Fine. That means that that impression was made after Mrs. Stendal bled. If it's Mrs. Stendal's blood. That's all it means.

[1504] Now, I am reasonably sure that the bleeding that took place during this assault was minimal, and I would think, I think she suffered some injuries to the inside of her mouth, and I would suggest that's probably where the majority of this blood came from. It's nothing, I guess, that you can speculate about from viewing the pictures. But one thing is for sure. The fatal injuries were not produced by – or bleeding was not a component of them.

So you have to make a big quantum jump as to whether they happened at the same time. And time is the second most important factor in this case, and it's something I'll be talking about more and more and more.

Because the value of the circumstantial evidence is contingent almost exclusively by time. And this case, the evidence in this case is almost void of any consideration of time. And I'll be getting into that a little bit more.

So, let's – when did Mrs. Stendal die? We don't know. Mr. Carlton chooses to use April 21st as the day. But I think anybody could choose to use April 22nd, if they would like.

I would think that she was found the morning of April 22nd, late in the morning of April 22nd, her body was found, she was last seen about 8:00 o'clock the evening before.

Now, something happened in that period. What fact can we rely on with particularity that will help us narrow that down? Doesn't that make a big difference? It makes a big difference to me.

First thing that comes to my mind, intoxication. Okay. [1505] If this happened over six, eight hour period of time, I don't think intoxication would be an issue at all. Person has a chance to assimilate the alcohol in his bloodstream, and that's just an example. Time is very important in identifying with particularity what inferences you can draw from the facts that you have.

The one thing that I remember is the water dripping from the tire wells of Mrs. Stendal's car. Now, if we assume that the assailant drove Mrs. Stendal's car and if Larry Jarrett sees the water dripping from the fender wells about 10:00 o'clock in the morning, it's reasonable to assume or I would assume that that assault took place in the very early morning hours of April 22nd.

That's the only fact I can come up with, and I've tried desperately to narrow this down into time somehow. Because alibi only has value when compared to the time. Accomplice only has value when compared to time. We're talking about who committed this, and it's important to decide when it was committed to compare it with the time elements.

Let's take Robert Manley, for example. Robert Manley is very convenient in his testimony in this case. Very, very convenient. He alibis himself, just about completely, incriminates Bill just about completely, and there's no way to verify anything that he said.

Now, that's a pretty convenient way to do this. Mr. Manley is also a convicted felon, along with Mr. Proctor. We know that the two of them were good friends. They did a lot together, they shared, at least I guess Mr. Proctor

[1506] was frequently over at Mr. Manley's house, stayed there without even an invitation. These are very good friends.

We know that a year before, 1981, they both committed a burglary together. They've been friends for quite some time. Several years, I think the testimony was.

Then they are both arrested. Excuse me, they are both apprehended, and taken to the Shasta County Sheriff's Office. Manley says A, B, C, D, E, F, G. Proctor says X, Y, Z. They let Manley out the door and they say, Billy, you're our boy. And it seems clear to me, they compare the evidence they have against one against the evidence they have against the other, so they said we don't have any evidence of two, so we'll just let Mr. Manley go.

It seems to me obvious that that was the conduct of this investigation. Because at no time after that that I'm aware of did anyone attempt to eliminate Mr. Manley as a suspect.

Consider this for a minute. Consider the state of the evidence the day that Mr. Proctor and Mr. Manley are arrested for this offense. What did the police know at this stage?

They knew a murder had been committed, or at least a homicide had been committed. I don't know what else you can say. The phone wires were cut, there are other things about the scene, but as far as the identity of the people or persons involved in this, they didn't know that.

Why did they pick up those two gentlemen? We all know why. Because they suspected that one or both of

them, probably [1507] both, were involved in it somewhere.

They know Mr. Manley lives right around the corner. This is a small community. And this is no accident, it's no accident at all. It's just good police work. They are going to say we're going to round up all the people that we think have the ability to do this, and who are the first people they're going to round up? Mr. Manley and Mr. Proctor.

Now, let's look at what could have been done to eliminate Mr. Proctor in any one particular fashion. How about typing his blood? How about examining him for injuries? How about searching his house? How about running tests on him? None of these things were done and they weren't preserved and we can't go back and do them now.

But that's the problem with this circumstantial evidence. The state of the law in this case is that you can find Mr. Proctor, you can sentence him to the gas chamber and he didn't even commit the murder.

I'm not talking about the identity of the person, I'm talking about the state of the law, that that is capable of doing, and I think that's the most fearful thing, as I will mention later on. That has to do with this entire case.

Mr. Manley is acquainted with the Stendal residence, has busted in there a couple of times before. These are all general characteristics of Mr. Manley. It's nice for me to sit here, Monday morning quarterback, and say they should have done some other investigation, eliminate Mr. Manley, if they could. That didn't happen.

To put it in its proper perspective, it doesn't mean, [1508] nor does it prove, in any way, shape or form, that Mr. Proctor acted alone or that he was in there at the relevant times at all. It doesn't prove that. It's a nice accusation to make, but the law requies [sic], and I said at the outset, we want you to rely on the facts and the law, exclusively.

And look at these things, turn them over, examine them as you will, and try to make whatever inferences are possible out of this, and I'm sure that you'll end up with a sentence of life in prison without the possibility of parole.

To further illustrate that – no, excuse me, let me back up just a minute.

I don't want to belabor the point, I can't try Mr. Manley in this case. I don't know what occurred. If I were to sit here and guess, as to what might have occurred or how I can use facts or even my own common sense to figure out whether this was done by one person, two people, or even the identity of the person, I can't do it.

The palm print is helpful. It sure is. It's a damning piece of evidence. But it's not all that helpful. It tells me he was there, but that's all it tells me.

Okay. It tells me that he was there after bleeding occurred. But I don't know, I mean, Mrs. Stendal could have been – well, see what am I doing, I'm guessing again. That's what we can't do. We can try to use our common sense, but we got to have a fact to ground it to. That's what I mean by particularity.

So I'm going to leave Mr. Manley for now. It's not my job to prove that he did this or participated in any way, [1509] shape or form. The facts, there is nothing that says that he isn't heavily involved in this and perhaps even the perpetrator of the crime. There's no fact that says that isn't true.

The facts you try to use are facts supplied to you by Mr. Manley, which, as I say, is very convenient in this particular case.

Before I – let me continue on with this, and I don't want to bore you with it, because I think you'll be able to see what my point of view is and I think if you will attempt it, you will probably do a better job than I do, if you look at things in particularity.

The cigarettes, and I have already talked about. These scratches. Okay. On the knees. They are a skinned knee, as far as I could tell.

That's, I suppose, a fact. But what are we going to do with it? What inference can be drawn, what deduction can we make from the existence of those?

Well, first of all, they were observed on a certain day. The doctor testified in his opinion they were within, you know, so much period of time, and included the time that might have been involved in this particular case, although they didn't match up exactly.

We know what Mr. Proctor was doing, pretty much during that period, and I know that what happened on – or we know from the evidence that what happened on the 22nd of April was that Mr. Manley and Mr. Proctor drank copious amounts of alcohol and ended up with a couple

of young ladies and [1510] it was the next day said I don't know how I got them.

Now, it may seem incriminating to you, but it's not examining the evidence with particularity at all. Now, it's not up to you to supply the missing link here, it's up to Mr. Carlton to provide it for you. So what does that mean? It doesn't lead you anywhere, you can make assumptions but you can't, as an individual, you can't really say that that's a fact or a truth or that it supports an inference that I would want to make in a case of this magnitude, actually in any case.

[1511] The knots. Want to touch on the knots. I – I guess I would have been one of the forty or fifty people that knew how to tie those knots. I know how to tie a lot of knots. But I also know that they're very, very common. And I think if you look at it it doesn't lead you anywhere.

They – the testimony was that – I don't know how many months before April, 1982, that these and other knots were taught to the defendant as part of a course in truck driving. Doesn't say he learned them. Doesn't say he knows how to tie those or even that they're – they're applicable and appropriate to the crime in this particular – there's nothing tying those things together. Nothing at all.

Again, you can make an assumption but you can't draw an inference and that's what – that's why I'm talking about particularity.

Now, I'd like to talk about what we really came here to do and that is this right here. (Indicating.)

Now, I'm going to assume for a minute that in your deliberations you decide to consider this matter, that is the ultimate matter that your verdict will reflect and that being the comparison or weighing of aggravating and mitigating factors.

Now, I suppose you could do it any way you choose, but you might say let's assume all of the – you know; that we can find all of those factors in the first two steps, let's start there and weigh it because if we can't – if it comes out on the side of mitigating, these other findings don't matter to you. They're very inconsequential to you.

You don't have to find the truth of a first degree murder [1512] a rape or a burglary or even consider that matter if you start here and you say well, I'm weighing these two off against one another and I think mitigation tips the scales. That may be your verdict. That may well be your verdict.

That's why I want to discuss these very particularly. Mr. Carlton has two that he wants to take to the bank and I have two that I want to take to the bank.

And there's an instruction which says that you are not to just count them up but that you are to weigh them and give them the credit to what – that you think they deserve.

I heard in listening to Mr. Carlton's argument, I think this is the way that this – this case is going to break down to a comparison of these and perhaps some other factors. Now, you are to consider these factors and weigh them as you feel appropriate, and you are given no other direction than that.

So, I would like to talk about them specifically. This is the circumstances of the crime. That's what crime means. And that's when I wrote up there.

Mr. Carlton says this is a vicious murder. And I don't know what the opposite of a vicious murder is but I think all murder is vicious and I think if I have the responsibility and the duty of examining this murder, that I ought to make some determination as to whether this is a vicious murder or not.

Can you strangle somebody in a gentle – gentle way? Aren't all strangulations aggravated? Not in the eves of the law. Not in the eyes of the law.

You may choose to weigh that and compare it with what you know in other instances. Okay.

[1513] I don't want to be too ghoulish about this but the – we all read the newspapers and there are brutal crimes that happen every day. This one is not particularly heinous. It doesn't jump out at me as being one that is greater. I can think of twenty to thirty right off the top of my head that are much more serious than – than this.

The law forces us to look at that. It's a very unpleasant kind of thing to even think about, but that's what Mr. Carlton is asking you to say. He's asking you to say this one's worse than other ones. This is an aggravated murder. Therefore, there must be a mitigated murder and you are to consider the opposite or the contrary of that and I don't know that that's really possible to do in the first place, but in the second place it's not really supported by the evidence.

If she was conscious that would make a big difference. If she was strangled first and the other things happened while she was, you know, in the process of dying as Dr. Stephens said, that would make a difference. We don't know any of these things.

And Mr. Carlton in his argument, and I trust I'm quoting it correctly, "I don't know the sequence of events," quote, unquote. Of course he doesn't. Dr. Stephens wouldn't tell us that. We don't know how this thing occurred.

There are ways that you can put it together that makes it more painful and more brutal than others, and I don't know what to do with that other than to suggest to you that there's been a failure of proof in this regard. Been a failure to meet a level of proof that we all know exists.

Talk about felony. Felonies in this case, two burglaries [1514] and an auto theft. You heard Mr. Manley characterize one of those burglaries. Mr. Manley and Mr. Proctor broke into a pizza parlor, Sam's Pizza Parlor, and they stole, I think he said 800 dollars worth of beer, or they were in the process of stealing it.

They figured out they couldn't carry it. It's too much beer to carry. So they stole a car, an old Ford product, I think, and backed it in, station wagon, backed it in and loaded it up with beer and off they go. They were apprehended a short while later and then both convicted of those.

That's it. These are the aggravating factors that Mr. Carlton is asking you to consider and return a death penalty verdict on. That's it.

MR. CARLTON: Your Honor, I'm going to object to that. That misstates my argument and the evidence.

THE COURT: The objection is sustained. Let's proceed.

MR. KENNEDY: On the other hand, these are all the mitigating factors that we have, that we can take to the bank anyway or that we are confident of. (Indicating.)

Youth. What does youth mean? Why would that be a mitigating factor? In California at age eighteen a person becomes eligible for the death penalty, that is a person who's seventeen cannot be executed.

The younger a person is the more we feel that the more exculpatory criminal conduct is going to be.

This is the one that's perhaps the most persuasive in my – in my mind and that is lack of prior violence. We're not talking [1515] about lack of prior criminal convictions for violence, we're talking about a lack of violence altogether; okay?

We're asked to believe that the first time that Mr. Carlton – Mr. Proctor gets violent, this is what results. And that's why this is a factor.

So, these are the ones we're asking you to compare. I think this event is kind of anomalous. I don't know what to do with this prior felony. It's a burglary but it's a

commercial burglary. It's a so-called second degree burglary.

The burglary that's charged in this case is a different animal.

Circumstances of the crime we've already talked about. This is a one-time event. How long did it take? We don't know when it occurred, so we don't know how long it took. But it took, you know, periods of time to occur.

These things take a lifetime to accrue. And that is what you are asked to compare. Can one violent event outweigh a lifetime of something else, of less than violence, of nonviolence? Is there a redeeming quality here that is – that – actually is rather obvious but there are other factors that I would like to discuss and not – won't take too long.

Excuse me, I'll read the whole instruction to you.

> "In determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial of this case, except as you have been instructed during the course of this phase of the trial. You shall consider, take into account [1516] and be guided by the following factors, if applicable: Circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance or circumstances found to be true. Presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence. The presence or absence of any prior felony conviction. Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance. Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act. Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation of his conduct. Whether or not the defendant acted under extreme duress or under the substantial domination of another person. Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or mental defect or the effects of intoxication. The age of the defendant at the time of the crime. Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor. [1517] Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime, including but not limited to the defendant's character, background, history, mental condition, and physical condition." We have talked about circumstances of the crime.

Presence or absence of any prior felony conviction, whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance. The interesting thing about that instruction is I would think that this is a pretty disturbing event and perhaps a disturbed mind was responsible for it. The unfortunate thing about this instruction is that they use the term "defendant" and again, it depends on how you slice the pie how you eat the dessert, and you

assume that it's Mr. Proctor, then you are right, there's no evidence been introduced as to mental disturbance at all. You assume it's somebody else, then I don't know where that would lead you. But that's something for you to consider. I think it depends on the person.

Whether or not the victim participated in the defendant's homicidal conduct or consented to the homicidal act. I think that's inapplicable in this particular case. I think it's designed toward a case that we don't have here.

> "Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation of his conduct."

We don't know why this occurred. Remember, Mr. Carlton [1518] is surmising that the motive was rape. Certainly there's no moral justification for that or I would – I would find – I would be very surprised if somebody could claim that they felt there was a moral justification for that kind of conduct.

But if we don't know what the motive is, we don't know whether this factor applies or not. If it does – well, we just don't know. It's difficult.

> "Whether or not the defendant acted under extreme duress or under the substantial domination of another person."

The only time the word "manipulate" was used, it was used to quote Mr. Proctor in some hearsay testimony about Mr. Proctor's being fearful of Mr. Manley's manipulating him.

Now, that's the only time I think that word even came up. Duress I don't think was done at all.

You may, I suppose, if we're drawing a – if we're assuming things, we may assume since Mr. – Mr. Manley is bigger, he's older and he's more experienced, that Mrs. Proctor said that – that Bill has always been a follower and never been a leader, we can assume that maybe there is some elements of that. I don't think we've proved it. I don't think that if you take my idea of examining these facts, examining these facts for particularity, that you can really come up with that conclusion.

But if you are going to make assumptions throughout your deliberations, you can certainly make one there to the benefit of the defendant.

> "Whether or not at the time of the offense the capacity of the defendant to appreciate the [1519] criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or mental defect or the effects of intoxication."

Again, if we assumed – let's assume that Mr. Proctor, that we're considering Mr. Proctor in examining this particular circumstance. Intoxication. If Mr. Proctor had a few cocktails, went over to Bohall"s for a few minutes and then went over to Stendal's and did all this by himself, he may well have been intoxicated.

It's important when these things occur to tell whether that's true or not; okay? If it didn't happen that way, if Mr. Proctor is not the person, Manley gets liquored up at his house and goes over to Stendal's house for one reason or another later on in the evening or

maybe even during this time and – and he commits these acts and then returns and he and Mr. Proctor go upstairs, Mr. Proctor is staying, and Mr. Proctor helps him dispose of the body at this – at that juncture, intoxication may well be a part of this case.

Mr. Manley certainly was intoxicated that evening. I think he admitted that. He admitted drinking throughout that period of time.

I remember 'cause I asked him that – for that – for specifically that reason. So, intoxication is another one of these things that if you look at it particularly you can say well, it may be a component of this case. It may be a factor I want to consider.

If you consider it a factor that's appropriate, I think [1520] you have to give the benefit of the doubt to the defendant. You don't have to consider it. You don't have to feel that it's applicable at all, but if it applies it applies to the benefit of the defendant.

> "Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor."

An accomplice – well, Mr. Carlton read you the instruction on accomplice; aid, encourage. A person who helps dispose of a body is an accomplice for sure. I mean, there's no question about that in the eyes of the law.

I'm not – I don't know what happened in this particular case, but if that's the case then Mr. – Mr. Proctor qualifies for that as a mitigating factor.

Okay. If you are making assumptions, you can make that assumption.

This is a new procedure, relatively new procedure, and there's no directions that I can find that help you very much in examining and weighing these things. I've spent my weekend trying to figure out how I would do it and what I would consider in doing this. Let me just give you some of my thoughts.

This felony, he's paid his price for that. We know that. I mean, he was convicted of that. That's why the felonies resulted. He paid his price for that.

That appears to me to be a juvenile event at best. By juvenile I mean not very mature. I don't put a lot of weight on that.

Theft type, you know, younger people are prone to theft [1521] type crimes. After a while I guess we all learn supposed to keep our hands on our own property, but this is not something that – that indicates an evilness of heart that might generate a – a giving this full dignity.

And let me compare it with –

MR. CARLTON: Your Honor, I'm going to object to this argument at this time. He's characterizing this as one felony. I think it –

THE COURT: The objection is sustained.

MR. KENNEDY: I'm sorry, I meant –

THE COURT: Well, there was a stipulation as to three felonies.

MR. KENNEDY: Excuse me, three felonies, and I'm not giving that much weight. It's not particularly similar. I don't think that's the purpose of this particular factor.

The purpose of this particular factor in my opinion is is there a prior act which is similar. Are there prior felonies that are violent? Prior homicides?

Consider what – if this was one felony, homicide, what would you think about weighing these factors off? They'd be considerably different. And I think that's what the people had in mind when this was enacted, that this wasn't supposed to be any we'll just add them up on the ledger sheet. I don't think that's it at all.

I think we're supposed to look at that and see what it tells us about the defendant and you determine what you will as to what that tells you about the defendant. It tells me he's immature. It tells me he's got a problem of drinking and keeping [1522] his hands to himself.

It doesn't tell me that he's a murderer. It doesn't tell me that he's a person who's worthy of being executed by the State of California.

No, I don't –I don't think that's part.

Circumstances of the crime. We've already talked about that. Now we get into the youth. I feel that there are two components when it comes to youth. One component is the judgment that we gain as we get older and older and that a person the older they get the more culpable they get for their acts. And that's why – that's why there's this old expression of you are old enough to know better.

[1523] MR. KENNEDY: That's what age is all about, that we somehow develop judgment. Now, this judgment that we develop improves as we get older. And so that the older a person is, the more culpable he would be for this particular kind of a crime.

There's another component which I think is interesting, and that is youth has a lot to do with how long a person spends in prison. If the verdict is life in prison without the possibility of parole, and that's the verdict for Mr. Proctor, actuarially, he's going to live to be eighty-five years old, he's going to spend more time in prison because of his youth. So that should be a mitigating factor towards him. So I think there are two reasons to consider this a mitigating factor.

And the last one is the most important factor. No prior violence. That leads me to believe that either Mr. Proctor wasn't involved, he wasn't alone, or something very disturbing happened. I don't know what it is, there's a failure of proof in this particular area. But I know one thing, that this is an uncontradicted fact.

I don't know, I'm going to conclude right now, and there is a lot more that I would like to say, but I think considering the hour and I think I'm getting a little bit tired, that it would be most efficacious for me to close, it's something I've been kind of looking forward to, anyway.

I'm not going to talk about the death penalty as a political event. It's enacted, it's the law of this state. I agree with part of it, I disagree with part of it, personally. [1524] But that's not important. I'm not going to try to talk you out of it. It's your duty to consider it and you all promised that you would consider it.

And I'm not going to try to make a political statement about the death penalty. I think we're all acquainted with the arguments for and against, and it's a difficult question, at best. I think I would be applying to your pity or your sense of empathy that – if I talked about these things.

And keep in mind that we want you to look at the evidence with the greatest particularity. We don't want you to make assumptions, we want you to make legal reasonable logical inferences.

But there are two things I would like to say about the death penalty. One, this is a book I found in the Shasta County library not long ago, and it is a reporter's description of an execution in the gas chamber in California.

MR. CARLTON: Your Honor, I'm going to object to that.

THE COURT: Sustained. May I see it, please. The objection will be sustained. The Court is familiar with that piece of work.

MR. KENNEDY: The last thing I want to talk about is a personal note. I've been acquainted with this case for about a year, and I, I think, like all of us, we make vows to one another or vows to ourselves, rather, and promises. And a lot of them we break. And I make the distinction in my own mind that if I promise myself something, I will do it. I have never failed to do that.

A vow, I might not make it to the full extent, but [1525] promises, and that's why I use that word to myself, I must carry it through, it is my duty, the passion.

The last time was quitting smoking. I promised myself I would never have another cigarette again, and that was three years ago. That's just an example of a promise.

Well, I've made myself a promise in this particular case, and it's one I invite each one of you to make. If possible, I'm going to go to the execution. I have heard –

MR. CARLTON: Your Honor, I'm going to object to this.

THE COURT: Objection sustained. It's improper argument. Confine yourself to the law involved in this case.

MR. KENNEDY: Ladies and gentlemen, the biggest fear in this case that we all have, everyone in this room has, is that we execute the wrong person. That possibility exists, as long as circumstantial evidence is used to prove his guilt. Without direct evidence, that possibility exists. And that is what rests on this particular case.

There are examples of people who are convicted who later are acquitted or found out not to be true. It does happen. And the way it happens is circumstantial evidence. The way it happens is that people make assumptions instead of using the facts and logically the way the law intended.

(PENALTY PHASE JURY INSTRUCTIONS (partial))

[1529] TUESDAY, MAY 17, 1983 9:40 A.M.

The matter of the People of the State of California vs. William Arnold Proctor, defendant, Number 65383, came on regularly for hearing on this day in the Superior Court of the State of California, in and for the County of Sacramento, before the Honorable Sheldon H. Grossfeld, Judge, Department Number Five.

The People were represented by Stephen S. Carlton, District Attorney in and for the County of Shasta, State of California.

The defendant was represented by Stephen C. Kennedy, Deputy Public Defender in and for the County of Shasta, State of California.

The following proceedings were had, to wit:

THE COURT: Good morning, ladies and gentlemen. Apologize for the delay in starting.

All right. The record will reflect the defendant is present along with respective counsel, that the ladies and gentlemen of the jury are all present and in their respective places, as are the alternates.

"Ladies and gentlemen of the jury:

"You have now heard the evidence in this phase of the trial and we have come to that place in the trial where you are instructed on the applicable law.

"I am required to read the instructions to you in open court. In addition, you will have these instructions in the jury room for your use during your deliberations, and you may follow

the Court's reading of the instructions as I do so.

[1530] "The bailiff," Officer Studebaker, "will now hand each of you a copy of the instructions which the Court is now reading."

And I will be commencing my reading on the fourth paragraph down. I'd ask you to read the instructions with me. Do not read them faster than I do and I ask you to read slowly as I will do so that you will have a better understanding of what the instructions state.

Starting with the fourth paragraph, page one. You will notice the instructions are paginated for your use in your deliberation room if you desire to do so.

"You will find that the instructions may be either printed, typewritten, or handwritten. Some of the printed or typewritten instructions may be modified by typing or handwriting. Blanks in the printed instructions may be filled in by typing or handwriting. Also, portions of printed or typewritten instructions may have been deleted by lining out.

"You are not to be concerned with the reasons for any modifications that have been made. Also, you must disregard any deleted part of an instruction and not speculate either what it was or what is the reason for its deletion.

"Every part of an instruction, whether it is printed, typed or handwritten, is of equal importance.

"You are to be governed only by the instruction in its final wording, whether printed, typed, or [1531] handwritten.

"The defendant, William Arnold Proctor, has heretofore been found guilty of murder in the first degree. The charges that the murder was committed under the following special circumstances have also specially been found to be true, to wit: That the murder was committed in the commission of a burglary; that the murder was committed in the commission of a rape; and that the murder was perpetrated by torture.

"It is the law of this state that the penalty for a defendant found guilty of murder in the first degree shall be death or confinement in the state prison for life without possibility of parole in any case in which the special circumstances charged have been specially found to be true.

"Under the law of this state you must now determine which of said penalties shall be imposed on the defendant.

"It is my duty, in these instructions, to explain to you the rules of law that apply to this phase of the trial. You must accept and follow the rules of law as I state them to you.

"The fact that William Arnold Protor [sic] has been found guilty of murder in the first degree with special circumstances, and that the special circumstances were found to be true, does not in and of itself constitute an aggravating factor or factors. You must examine the evidence presented to you at [1532] this trial, and you must be satisfied beyond a reasonable doubt that the defendant William Arnold Proctor committed the crimes, including the circumstances thereof, before you may determine whether or not the crimes and the circumstances thereof constitute an aggravating factor.

"Reasonable doubt is defined as follows: It is not a mere possible doubt, because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

"In determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial of this case, except as you have been instructed during the course of this phase of the trial. You shall consider, take into account, and be guided by the following factors, if applicable:

"(a) The circumstances of the crime of which the defendant was convicted in the present proceeding, and the existence of any special circumstance or circumstances found to be true.

"(b) The presence or absence of criminal activity by the defendant which involved the use or [1533] attempted use of force or violence, or the expressed or implied threat to use force or violence

"(c) The presence or absence of any prior felony conviction.

"(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

"(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

"(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation of his conduct.

"(g) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.

"(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or mental defect or the effects of intoxication.

"(i) The age of the defendant at the time of the crime.

"(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

[1534] "(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime, including but not limited to the defendant's character, background, history, mental condition and physical condition.

* * *

[1557] Ladies and gentlemen, it is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed upon the defendant.

After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account, and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have [1558] been instructed.

If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death. However, if you determine that the mitigating circumstances outweigh the aggravating circumstances, you shall impose a sentence of confinement in the state prison for life, without possibility of parole.

Before you may consider a particular aggravating circumstance to be true, you must be satisfied of the existence of that aggravating circumstance beyond a reasonable doubt.

Reasonable doubt is defined as follows: It is not a mere possible doubt, because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

In determining the question of the penalty to be imposed upon William Arnold Proctor, you shall weigh the sympathetic elements of his background against those that may offend the conscience. In so doing, you may consider pity, sympathy, and mercy for the defendant. However, you may not be governed by conjecture, prejudice, or public opinion.

[1559] In considering, taking into account, and being guided by the aggravating and mitigating circumstances, you may not decide the effect of such circumstances by the simple process of counting the number of circumstances on each side. The particular weight of such opposing circumstances is not determined by the relative number, but rather by their relative convincing force on the ultimate question of punishment.

If a factor is not found by you to be a mitigating factor, that in and of itself does not make that factor an aggravating factor. In order for a factor to be considered an aggravating factor you must be satisfied beyond a reasonable doubt that the factor does exist, and it is only if you determine that the factor exists beyond a reasonable doubt that you may consider the factor an aggravating factor.

If you determine that the aggravating factors do not outweigh the mitigating factors, or if you determine that they are equal, you must return a verdict of life imprisonment without the possibility of parole.

If any rule, direction or idea in these instructions has been repeated or stated in varying ways, no emphasis was intended and you must not draw any inference because of its repetition. You are not to single out any certain sentence or any [1560] individual point or instruction and ignore the others. You are to consider all the instructions as a whole and are to regard each in the light of all the others.

The order in which the instructions have been given has no significance as to their relative importance.

Ladies and gentlemen, I have not intended by anything I have said or done, or by any questions that I may have asked, or by any ruling I may have made, to intimate or suggest what you should find to be the facts on any question submitted to you, or that I believe or disbelieve any witness or witnesses.

If anything I have done or said has seemed to so indicate, you will disregard it and form your own opinion.

You have now been instructed as to all the rules of law that may be necessary for you to reach a verdict. Whether some of the instructions will apply will depend upon your determination of the facts. You will disregard any instruction which applies to a state of facts which you determine does not exist. You must not conclude from the fact that an instruction has been given that the Court is expressing any opinion as to the facts.

Both the People and the defendant are entitled to the individual opinion of each juror.

It is the duty of each of you to consider [1561] the evidence for the purpose of arriving at a verdict, if you can do so. Each of you must decide the case for yourself but should do so only after a discussion of the evidence and instructions with the other jurors.

You should not hesitate to change an opinion if you are convinced it is erroneous. However, you should not be influenced to decide any question in a particular way because a majority of the jurors, or any of them, favor such a decision.

Ladies and gentlemen, the attitude and conduct of jurors at the beginning of their deliberations are matters of considerable importance. It is rarely productive of good for a juror at the outset to make an emphatic expression of his or her opinion on the case, or to state how he or she intends to vote. When one does that at the beginning, his or her sense of pride may be aroused and he or she may hesitate to change his or her position, even if shown that it is wrong. Remember, ladies and gentlemen, that you are not partisans or advocates in this matter, but are judges.

You shall now retire and select one of your number to act as foreperson who will preside over your deliberations. In order to make a determination as to the penalty to be imposed upon the defendant, to wit, William Arnold Proctor, all twelve jurors must agree.

[1562] Any verdict that you reach must be signed and dated by your foreperson on a form that will be provided and then you shall return with it to the courtroom.

When all twelve of you have agreed upon a verdict, all your foreperson will do will be to sign and date the particular verdict that you have all agreed upon. You can take the one which you find on arriving at your conclusion and return to court with the same.

I read the forms of verdict to you. The order in which they are read is of no significance. After the title of Court and cause, they are:

"We, the jury in the above-entitled cause, find that the aggravating circumstances outweigh the mitigating circumstances and therefore impose a penalty of death as a result of defendant's conviction of murder in the first degree with special circumstances found to be true relating to the death of Bonnie Stendal.

"We, the jury in the above-entitled cause, find that the mitigating circumstances outweigh the aggravating circumstances and therefore impose the penalty of confinement in the state prison for life without possibility of parole as a result of defendant's conviction of murder in the first degree with special circumstances found to be true relating to the death of Bonnie Stendal."

[1563] As indicated, in this case there are two possible verdicts. These two possible verdicts have been set forth in the instructions given to you and are set forth in the forms of verdict which you will receive. Only one of the possible verdicts may be returned by you. When you all have agreed upon one verdict, the corresponding form is the only verdict form to be signed. The other form is to be left unsigned.

Ladies and gentlemen, I wish to say from this time on you will receive no visitors from any source whatever. If in the course of your deliberation you have any matter that you desire to take up with the Court, you will notify the bailiff in charge, in writing, on the forms provided, who will bring you before the Court for that purpose. Ladies and gentlemen, the case now remains with you.

Mrs. Skaggs, will you kindly swear the bailiff, Officer Studybaker, to take charge of this

jury and the bailiff alone will take charge of them."

THE CLERK: Do you solemnly swear that you will take charge of the jury and keep them together, that you will not speak to them yourself nor allow anyone else to speak to them on any matter connected with this case and when they have reached a verdict, you will return them to this courtroom, so help you God?

THE BAILIFF: I will.

[1564] THE COURT: Ladies and gentlemen of the jury, will you kindly follow Officer Studybaker to your deliberating room. The evidence will be delivered to you shortly, as will the verdicts. Officer Studybaker has now received the forms that you are to use if you desire to contact the Court. The alternates will please remain.

Ladies and gentlemen, you may take your notebooks and your instructions with you.

(At 10:33 a.m. the jury retired to deliberate on a verdict.)

THE COURT: All right. The record will reflect the defendant is present along with respective counsel, that the alternates, Mrs. Lubiens, Mrs. McCormick and Miss Tripp are present.

Mr. Kennedy, will you stipulate along with your client, Mr. Proctor, that the alternates need not remain in the custody of the sheriff, so long as they are properly admonished and available in the court house?

MR. KENNEDY: I will so stipulate.

THE COURT: Is that agreeable with you, Mr. Proctor?

DEFENDANT: Yes, sir.

THE COURT: Mr. Carlton?

MR. CARLTON: Yes, your Honor.

THE COURT: Mrs. Lubiens, Mrs. McCormick and Miss Tripp, while the regular jurors deliberate, you are excused to return to the jury lounge or go elsewhere in the court house. However, you are not discharged as alternates in this case, but remain fully responsible to this Court as alternate jurors.

You shall remain on call and if called upon by this [1565] Court, you shall report here for the purpose of deliberating. You shall remain on call until such time as you are notified by me or by an officer of this Court that you are in fact discharged.

While you thus remain on call, you are again admonished that it is your duty not to converse among yourselves or with anyone else nor permit anyone else to speak to you on any subject matter connected with this trial, nor are you to express any opinion thereon until you are called upon to deliberate.

If you are approached or spoken to by anyone regarding this case, you shall immediately inform the Court of such fact.

You are further admonished that you are not to seek any information from any source with regard to this case, other than the evidence that you have heretofore heard. In addition, you are not to read any newspaper accounts

of [sic] listen to any radio broadcasts or television telecasts of accounts relating to this trial, murder trials in general or specific, or the penalty of life without possibility of parole in state prison or the death penalty.

You are further admonished that you are not to talk or communicate with any of the attorneys in this case prior to the rendition of a verdict beyond a casual word of greeting.

If you don't hear from us sooner, please return to this courtroom at five minutes to 12:00. We'll ask you to leave your notebooks and your instructions in your seat, you'll find them when you return.

* * *

(FURTHER INSTRUCTION (re jury inquiry))

[1579] (At 11:00 o'clock a.m. the following proceedings were had in open court in the presence of the defendant and counsel, out of the presence of the jury and alternates:)

THE COURT: All right. The record will reflect the defendant is present along with respective counsel, that we're outside the presence of the jury in the matter of the People of the State of California vs. William Proctor.

As the Court has informally advised respective counsel, the Court has received the following communication from the jury.

> "We, the jury in the above-entitled cause, request the following: Regarding page 2 of the instructions, the first sentence indicates 'conviction of murder in the first degree exclusive of special circumstances.' Was defendant in fact convicted of also burglary, rape and torture exclusive of their application as special circumstances? Please explain."

What the Court proposes to respond to the jury is as follows.

> "The answer to your inquiry is as follows: The defendant has heretofore been found guilty of burglary in the first degree and forcible rape as those offenses have been defined for you in the instructions which you have been given which you possess.
>
> "As to your inquiry with – regarding torture, the defendant was convicted of murder in the first degree. A person may be convicted of murder in the [1580] first degree based on any one or more of the three theories applicable to murder in the first degree upon which you have been instructed, to wit: A willful and deliberate premeditated killing of a human being with the specific intent to kill and express malice aforethought being present; 2. Under the felony murder rule; 3. Murder which is perpetrated by torture."

In response to Mr. Kennedy's request, there being no objection by Mr. Carlton, the Court will then read the following which is the instruction which we've designated as Instruction 3 which is a – which was given to the jury at the request of and with the stipulation of the People and the defendant which reads as follows:

> "The fact that William Arnold Proctor has been found guilty of murder in the first degree with special circumstances, and that the special circumstances were found to be true, does not in

and of itself constitute an aggravating factor or factors."

And I think what I'd like to do, if it's agreeable with counsel, is to change that to read in light of the inquiry of the jury,

"The fact that William Arnold Proctor has been found guilty of murder in the first degree with special circumstances, and that the special circumstances were found to be true, and the fact that William Arnold Proctor has been found guilty of burglary in the first degree and rape, do not [1581] in and of itself constitute an aggravating factor or factors.

"You must examine the evidence presented to you at this trial and you must be satisfied beyond a reasonable doubt that the defendant William Arnold Proctor committed the crimes including the circumstances thereof before you may determine whether or not the crimes and the circumstances thereof constitute an aggravating factor.

"Reasonable doubt is defined as follows: It is not a mere possible doubt because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.

"You are further advised that the fact defendant has been found guilty of murder, burglary and rape may constitute an aggravating factor if you so determine in accordance with the

instructions given to you, but cannot be considered as an additional aggravating factor under the factor designated (b) in the instruction given to you found on page 4 of your instructions, to wit: (b) the presence or absence of criminal activity by the defendant which involved the use or attempted [1582] use of force or violence, or the expressed or implied threat to use force or violence."

For the record it's CALJIC 8.84.1(b).

Mr. Carlton, do you have any objection to the Court giving – responding to the jury's inquiry in the manner set forth in open court in your presence?

MR. CARLTON: None at all.

THE COURT: Mr. Kennedy, do you?

MR. KENNEDY: No, your Honor.

THE COURT: Is that agreeable with you, Mr. Proctor?

DEFENDANT: Sounds all right with me.

THE COURT: All right. Officer Freese, would you be so good as to notify Office McGuire to bring the jury in?

(The following proceedings were had in open court in the presence of the defendant and counsel, in the presence of the jury and alternates:)

THE COURT: Good morning again.

All right. The record will reflect the defendant is present along with respective counsel, that the ladies and

gentlemen of the jury are all present in their respective places, as are the alternates.

Will counsel stipulate that all jurors are present?

MR. CARLTON: Yes, your Honor.

THE COURT: The record will further reflect the jury has been returned to the courtroom as a result of the communication which the Court has received from the jury through the bailiff.

Mr. Burruel, the Court has received the following communication:

> [1583] "We, the jury in the above-entitled cause, request the following: Regarding page 2 of the instructions, the first sentence indicates 'conviction of murder in the first degree exclusive of special circumstances.' Was the defendant in fact convicted also of burglary, rape and torture exclusive of their application as special circumstances? Please explain." Signed by yourself and dated today.

Is that the communication which you have signed?

JUROR BURRUEL: Yes, it is.

THE COURT: Very well.

Ladies and gentlemen, the answer to your inquiry is as follows:

> "The defendant has heretofore been found guilty of burglary in the first degree and forcible rape as those offenses have been defined for you in the instructions which have been given to you and which you possess.

> "As to your inquiry regarding torture, the defendant was found guilty of murder in the first degree. A person may be found guilty of murder in the first degree based on any one or more of the – of the three theories applicable to murder in the first degree upon which you have been instructed, to wit: A willful and deliberate premeditated killing of a human being with the specific intent to kill and express malice aforethought being [1584] present; 2. Under the felony murder rule; 3. Murder which is perpetrated by torture.
>
> "Ladies and gentlemen, you are further advised in response to your inquiry the fact that William Arnold Proctor has been found guilty of murder in the first degree with special circumstances, and that the special circumstances were found to be true, and the further fact that William Arnold Proctor has been found guilty of burglary in the first degree and forcible rape, do not in and of themselves constitute an aggravating factor or factors. You must examine the evidence presented at this trial and you must be satisfied beyond a reasonable doubt that the defendant William Arnold Proctor committed the crimes including the circumstances thereof before you may determine whether or not the crimes and the circumstances thereof constitute an aggravating factor.
>
> "Reasonable doubt is defined as follows: It is not a mere possible doubt because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the

jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.

"You are further advised that the fact that the defendant William Arnold Proctor has been found [1585] guilty of murder in the first degree, burglary in the first degree and rape may constitute an aggravating factor if you so determine in accordance with the instructions given to you but it cannot be considered or they cannot be considered as an additional aggravating factor under the factor designated (b) in the instructions given to you on page 4 of your instructions, to wit: the presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence, or the expressed or implied threat to use force or violence."

Ladies and gentlemen, that's the answer to the inquiry given to you and the explanation as you have requested. I'll now ask you to please follow Officer McGuire back to your deliberating room and resume your deliberations. Thank you.

(The following proceedings were had in open court in the presence of the defendant and counsel and the alternates, out of the presence of the jury:)

THE COURT: All right. The alternates please heed the admonition previously given to you. If you don't hear from us sooner please return at five minutes to 12:00. Thank you.

Madam Clerk, you will kindly file the note from the jury.

(The following proceedings were had in open court in the presence of the defendant and counsel, out of the presence of the jury and alternates:)

THE COURT: Either counsel wish to be heard? We're outside the presence of the jury and the alternates.

MR. KENNEDY: No, your Honor.

In the Superior Court of the State of California
In and For the County of Sacramento

The People of the State of California	)	CASE NUMBER 65383
	)	DEPT. NUMBER FIVE
vs.	)	**VERDICT**
WILLIAM ARNOLD PROCTOR	)	
_____	)	

We, the jury in the above-entitled cause, find that the AGGRAVATING CIRCUMSTANCES outweigh the mitigating circumstances and therefore impose the penalty of DEATH as a result of defendant's conviction of murder in the first degree with special circumstances found to be true, relating to the death of BONNIE STENDAL.

DATED: May 19, 1983 /s/ Armond R. Illegible
FOREPERSON

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

THE PEOPLE,	)	
Plaintiff and Respondent,	)	S004555/CR23185
v.	)	(Dec. 28, 1992)
WILLIAM ARNOLD PROCTOR,	)	
Defendant and Appellant.	)	
_____	)	

Following the guilt phase of a jury trial held in Shasta County, defendant William Arnold Proctor was found guilty of various offenses committed against Mrs. Bonita Stendal: first degree murder (Pen. Code, §§ 187, 189),[1] forcible rape (§ 261, subd. (2)), and first degree burglary (§ 460). The jury also found that defendant inflicted great bodily injury (§ 12022.8), and found true the special circumstance allegations that he committed the murder in the course of rape (§ 190.2, subd. (a)(17)(iii)), in the course of first degree burglary (§ 190.2, subd. (a)(17)(vii)), and with the infliction of torture (§ 190.2, subd. (a)(18)). After the court declared a mistrial as to the penalty phase of the trial, defendant's motion for change of venue was granted as to that phase, and after further proceedings a jury in Sacramento County imposed the death penalty. After denying defendant's

[1] All further statutory references are to the Penal Code unless otherwise indicated.

motion for modification of the verdict, the court sentenced defendant to death. This appeal is automatic. (§ 1239, subd. (b).) We affirm the judgment in its entirety.

FACTS

The evidence at trial established that on the evening of April 21, 1982, defendant entered the residence of Mrs. Bonita Stendal, a widow living alone, and sometime that evening or early the next morning, raped, tortured, and murdered her. Defendant then transported her body in the trunk of her automobile to a site near a lake 12 miles away, where he pushed the body off an embankment.

I. GUILT-PHASE EVIDENCE

A. The prosecution's case.

1. The crimes.

Mrs. Bonita Stendal, 55 years of age, lived on Ponderosa Street in Burney, a small mountain community located 35 miles east of Redding in Shasta County. Mrs. Stendal taught first grade students at the East Burney Elementary School. The last person (other than defendant) to see her alive on the evening of April 21, 1982, was a fellow schoolteacher, Robert Schmidt, who briefly spoke with her at the supermarket in Burney and then encountered her 10 minutes later at the nearby drugstore, approximately 7:50 p.m.

Later the same evening, Mrs. Stendal's neighbor, Patty Olinger, was seated in her automobile as it was being pushed through the intersection at Marquette and Ponderosa Streets, when she observed Mrs. Stendal's

muddy vehicle parked in the driveway of Mrs. Stendal's residence on Ponderosa Street.[2] During the two-year period of their acquaintance, Olinger had known Mrs. Stendal always to park her vehicle inside her garage and never in the driveway, and had known her always to keep her vehicle clean. Olinger observed the lights on inside Mrs. Stendal's residence at this time.

Approximately 8:55 a.m. the following morning, Dena Humble, the secretary at Mrs. Stendal's school, was notified that Mrs. Stendal had failed to arrive. Upon telephoning Mrs. Stendal's residence and receiving no response, she telephoned Mrs. Stendal's next-door neighbor and teaching assistant, who informed Humble she did not know where Mrs. Stendal was. Humble then proceeded to Mrs. Stendal's residence, letting herself in the unlocked door and walking through the house when no one responded to her knock. Humble noticed a fork was on the kitchen counter, and the oven door was open. Inside the garage, Humble noticed a light was on and both of Mrs. Stendal's automobiles were inside. Returning to school, Humble notified the police.

Approximately 9:30 that morning, Sergeant Larry Jarrett of the Shasta County Sheriff's Department conducted a brief search of the Stendal residence. He observed that the house was very neat overall. There was an open pickle jar and carving fork on the kitchen counter, and a drawer containing carving forks and large knives was

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[2] This witness testified she observed the vehicle in that condition and location, approximately 7:50 p.m. that evening. This reported time does not correlate with the testimony of other witnesses as to the relevant time periods.

partly open. In the bedroom, the bed was covered only by a sheet.

Sergeant Jarrett departed to report to his superior, Lieutenant Phil Eoff, and shortly thereafter, accompanied by Sergeant Michael Shaeffer, an officer specializing in evidence and identification, they searched the residence more thoroughly. This time, the officers noticed that the telephone lines leading to the kitchen and den telephones had been severed, and the drapes in the den had been pulled off the hooks at one end. The officers also observed that one of the two vehicles in the garage was muddy, water was dripping from its fender wells, and there were wipe marks across the entire outside lid of its trunk. After a locksmith opened the trunk, it was discovered that the items inside appeared to have been pushed into the outer edges of the trunk, and the dust inside recently had been disturbed.

At 4 p.m. that same day, April 22, 1982, newlyweds Robert and Susan Porter stopped their vehicle on the shoulder of the road near an embankment at Lake Britton, located 12 miles from Burney, in order to let out their dog and take a photograph of the scenery. When Robert Porter looked over the embankment, he discovered a body lying approximately 11 feet from the road. The couple telephoned law enforcement authorities and waited by the body for their arrival.

Sergeant Jarrett identified the body as that of Mrs. Stendal. It appeared to have been thrown from the roadway. Tire tracks of the same design as those made by the tires on Mrs. Stendal's automobile ran perpendicular to the road, and, from the tire tracks, drag marks led to the

top of the embankment. The body was clad in a nightgown pulled up to the waist, and an unknotted scarf was draped around the neck. A green electric blanket covered the body. The hands were tied behind the victim's back with four sets of ligatures, made of cloth and nylons, by means of various types of "half-hitch" knots. There were some cuts and "damage" to the face.

On the morning of April 23, Sergeant Jarrett, accompanied by Shaeffer and several other experts, returned to Mrs. Stendal's house in order to take photographs and obtain fingerprints. Beneath an area rug on the bedroom floor, they discovered a small pool of blood, still damp, which proved to be the same type as Mrs. Stendal's blood. Other bloodstains were located on the knob of the bedroom dresser.

That same day, the authorities brought several longtime acquaintances of Mrs. Stendal into the residence. These individuals observed that a brown or beige purse she frequently used was missing, and that certain circumstances, such as the unlocked front door and missing bedspread and blanket, were unusual because Mrs. Stendal always locked the residence and kept it very neat.

On April 24, Dr. Boyd Stephens of the San Francisco County Coroner's office performed an autopsy on the body. He estimated that Mrs. Stendal had been killed some time between the early evening hours of April 21 and the early morning hours of April 22. She was not killed at the location at which her body was found but had been transported there after death.

In Dr. Stephen's opinion, Mrs. Stendal's death was caused by asphyxiation, initiated by nonfatal manual

strangulation and later by ligature strangulation. The face had suffered numerous cuts and bruises from a blunt force. The eyes were swollen shut and the nose and lips also were swollen. Dr. Stephens believed that most of these injuries resulted from seven to nine blows. There were various internal injuries in the area of the neck. There were a number of shallow stab wounds and incisions caused by dragging a weapon across the skin in the area of the neck. The curvature of some of the injuries indicated they had been inflicted slowly and deliberately. There were seven wounds less than two inches deep to the area of the right breast which had been inflicted while Mrs. Stendal still was alive but unable to move away from her assailant. In Dr. Stephens' opinion, these wounds were inflicted for the purpose of causing pain or fear.

Prior to death, Mrs. Stendal had suffered four stretching injuries on the labia and a fifth injury which extended into the opening of the vagina. In the coroner's opinion, four of these probably were caused by a foreign object, and the fifth, probably by a penis. There was no semen inside or on the body.

Also while alive, Mrs. Stendal had received a blunt-force injury to the area of her right kidney. There also were blunt-force injuries to her left foot. The ligatures used to tie her hands were tied so tightly they had cut into her wrists. There were post-mortem abrasion injuries attributed to dragging the body.

On April 30, the officers returned to the Stendal residence to perform a systematic investigation. On this occasion, they noticed small amounts of blood on the

bedroom nightstand. After dismantling and removing the bed, they found, near the location of the head of the bed, approximately one dozen pamphlets. Some of the pamphlets had blood on them and one appeared to contain a bloody palm print. Other latent palm prints were obtained from the booklets. The blood on some of the pamphlets later was identified as being of the same type as Mrs. Stendal's. The door to the master bedroom on the side facing the den appeared to have been wiped with a damp, dirty rag.

On May 2, Sergeant Jarrett returned to the residence and noticed a cigarette butt from an unfiltered cigarette lying outside a window of the residence; there were also indications a hand had been on the window sill (although no fingerprints could be obtained).

2. Evidence of defendant's involvement.

In view of the circumstantial nature of the evidence connecting defendant to the commission of the crimes, and the nature of the defense that was presented at trial, we consider it necessary to set forth in substantial detail the evidence relating to defendant's activities immediately preceding and following the commission of the murder.

Mrs. Stendal's son David (who was approximately 21 years of age at the time of trial) had lived with Mrs. Stendal until 1979, when he moved to Chico. David had known defendant (20 years of age at the time of trial) and Robert Manley (26 years of age at the time of trial) for several years and often had smoked marijuana with them.

David had concealed marijuana in various locations within the Stendal residence until sometime in 1979 or 1980. Manley resided with his mother, Neta Manley, less than one block from the Stendal residence.

From February 18, 1981, to April 9, 1982, defendant was not present in the Burney area. In late January 1982, defendant commenced a four-week general truck-driving course at Western Truck School, where he received instruction in tying knots. Students at the school were taught to tie several types of trucker's-knots, which knots were identical to those found on the ligatures used to bind Mrs. Stendal's wrists.

Approximately two weeks prior to the murder of Mrs. Stendal, defendant returned to live with his mother and two brothers in Burney. In the early morning hours of either Friday or Saturday, April 16 or 17, defendant and Robert Manley made four or five obscene or "crank" telephone calls from the Manley residence to various Burney residents. Robert Manley telephoned Mrs. Stendal and told her he would like to have sexual relations with her. Defendant made a separate obscene telephone call to an unnamed person.

On April 21, 1982, defendant hitchhiked to the Manley residence, arriving approximately 2 p.m. Mrs. Manley returned from work at 3 p.m. Prior to 5 p.m., Mrs. Manley drove defendant to a market in Burney to purchase liquor. When they returned to the Manley residence, the three had a drink and then ate dinner at 5 p.m. Approximately 5:30 p.m., defendant and Robert Manley walked to a local convenience store, where Manley purchased two packs of unfiltered Camel cigarettes (the brand and

type they both smoked), giving one pack to defendant. They returned to the Manley residence to drink and watch a baseball game on television, and remained there after Mrs. Manley departed at 7 p.m. Defendant had three or four drinks. The baseball game commenced approximately 7:35 p.m. Between 8 p.m. and 8:30 p.m., defendant telephoned his mother to report he was at the Manley residence and intended to remain there for the night.

Approximately 8:30 p.m. defendant departed, informing Robert Manley that he was going to one of the local bars to "pick up" a woman and would return later to spend the night. When he left, defendant was wearing thongs, white socks, blue jeans, a blue shirt, and a gold-colored windbreaker borrowed from Robert Manley, because defendant did not have his own jacket with him. Shortly after 8:30 p.m., defendant arrived at the residence of his friend Jeffrey Bohall, who lived five to six blocks from the Manley residence and four to five blocks from the Stendal residence. Defendant remained at that location until sometime before 10 p.m., when he departed in order to have a few drinks and "get a piece of butt." Defendant inquired whether Bohall wanted to accompany him but Bohall declined. Bohall's mother, Juanita Bohall, who was home during defendant's visit, testified that defendant was wearing blue jeans and an off-white or cream-colored lightweight jacket with a rust-brown trim. She could not clearly remember his shoes but thought they were light weight.

When Mrs. Manley returned to her residence between 10:30 p.m. and 11 p.m. that evening, defendant was not present. When Robert Manley retired at 2:30 a.m.

after watching the baseball game and a late-night movie, defendant still had not returned. When Mrs. Manley left for work between 5:30 and 6 a.m., defendant was not at the Manley residence. According to defendant's mother, Julia Proctor, defendant did not return to the Proctor residence during the night of April 21.

After sunrise, at 5:30 a.m. on the morning of April 22, defendant's aunt, Sharon Palkki, observed defendant walking across the street in front of Palkki's residence, which was located approximately 500 feet from Mrs. Stendal's residence, several miles from defendant's residence in Johnson Park on the outskirts of Burney. Defendant was wearing loose-fitting blue jeans, white socks, and sandals, and what appeared to be a pair of gloves was dangling from his right pants pocket. Between 6 a.m. and 7 a.m., defendant telephoned his brother, Ed Proctor, instructing him to have their mother give defendant a ride home from the local market. Another witness observed defendant telephoning from that location during the same time period. When defendant's mother picked him up, defendant was wearing blue jeans and a gold-colored windbreaker, which she did not recognize. His mother did not remember the type of footwear defendant was wearing but testified he owned a pair of thongs.

Approximately 11:30 a.m. on April 22, Robert Manley arose and telephoned defendant, who informed Manley that defendant had seen his (defendant's) mother downtown the previous evening and had driven home with her. When Robert Manley asked defendant whether he had watched the baseball game, the late-night movie, or any other television program at home, defendant responded he had not, and stated he was tired and

wanted to sleep. Defendant agreed to meet Robert Manley after doing defendant's laundry. Later that day, Robert Manley and his mother drove to the Proctor residence, where they picked up defendant. They proceeded to Redding in order to purchase tickets to a concert. Defendant returned Robert Manley's jacket at that time, and Manley observed it was cleaner than it had been when he had given it to defendant the previous evening. After being dropped off and obtaining the tickets, Robert Manley and defendant met two women and spent the night with them at a motel in Redding.

On the morning of April 23, Shasta County officers brought defendant and Robert Manley to the sheriff's station for questioning. Defendant told Sergeant Jarrett that he had been at Robert Manley's residence until 8:30 p.m. on April 21 and then had gone into Burney. Defendant stated he had received a ride home that evening from an unidentified man in a pickup truck. At his residence, defendant had sharpened some knives for his mother, and had been home several hours before retiring at 11 p.m. Defendant did not arise until 9 a.m. on April 22, and did not leave the residence until after 3 p.m., when he went to Redding with Robert Manley and spent the night at a motel. Defendant showed Jarrett a motel room receipt, which defendant volunteered he had kept "for an alibi in case anything flared up." Defendant denied having visited Mrs. Stendal's residence.

Defendant was placed in custody for a parole violation he admitted to the officers. One of the officers observed that defendant had suffered abrasions below each knee, and that there were what appeared to be five or six somewhat parallel scratch marks above defendant's

right knee. On April 24, Dr. Stephens examined defendant's leg injuries and determined they probably were two days old, and had not been sustained through any layers of clothing but rather while defendant's legs were uncovered. The injuries were similar to injuries Dr. Stephens had observed in other sexual assault cases.

On May 1, Mrs. Proctor visited defendant in custody and afterward informed one of the detectives that her son had asked her to tell Sergeant Jarrett that he had been at home on the night of the murder. When Mrs. Proctor had advised defendant she already had told Jarrett otherwise, defendant asked her to tell Jarrett that defendant had been at a party that evening.

The bloody palm print obtained from one pamphlet proved to match defendant's palm print, and the other, latent palm prints obtained from the booklets also matched defendant's palm prints. A very faint print from footwear was found at the location where the body was discovered and proved to be similar in design to the tread of a pair of thongs recovered from defendant's possession. On May 2, defendant was placed under arrest for the murder of Mrs. Stendal.

B. The defense case.

Defendant had known Robert Manley for several years prior to the murder. He testified he was acquainted with David Stendal, had known Mrs. Stendal approximately three to four years, and had been inside the Stendal residence on twenty or thirty occasions. Defendant testified that Manley and David Stendal had used marijuana and amphetamines on many occasions, and

Manley had broken into the Stendal residence on at least two prior occasions. A defense investigator testified that Manley had informed him that one of the entries had been for the purpose of locating drugs.

Defendant testified that, after drinking the previous evening, he had awakened on the Monday or Tuesday morning prior to the day of the murder, with the bruises on his legs which the officers later had noticed. Defendant further testified that on the afternoon of April 21, 1982, he and Manley drank whiskey mixed with cola at the Manley residence. Defendant and Manley wanted to attend a concert in Chico, and Manley began to talk of retrieving various drugs which he knew David Stendal had secreted in the Stendal residence, and which defendant believed Manley intended to sell in order to raise money to purchase the tickets. After having two or three drinks, defendant left the Manley household shortly after 8:30 p.m. and proceeded to Jeffrey Bohall's residence, where he remained until 9:30 or 10 p.m. After Bohall refused to accompany defendant to "party," defendant left on foot to purchase Camel Light, filtered cigarettes (his brand and type) at a liquor store. The walk to the store took him one and one-half hours, and he returned to Manley's residence approximately midnight.

Upon arriving, defendant was unable to locate Manley and retired to an upstairs bedroom. Defendant awoke several hours later, at dawn on April 22. Defendant could not find Manley, but at this time discovered a note addressed to defendant on the side of the dresser, notifying him that Manley had departed to "check Stendal's stash" and would return shortly. Defendant decided to follow Manley to the Stendal residence.

When defendant arrived, the garage door was open but Mrs. Stendal's automobile was not inside the garage. The lights were turned on in the front room, and after no one responded to his knock, defendant entered through the unlocked sliding glass door. Defendant did not locate either Robert Manley or Mrs. Stendal, but noticed a puddle of blood next to the bed that he "just kind of tested" by touching it with the back of his hand. He noticed some pamphlets between the bed and a nightstand but did not recall touching the pamphlets upon which his palm prints later were detected. Defendant immediately ran out the back door to the market, where he telephoned his mother to ask that she pick him up. At home, defendant slept for several hours and telephoned Robert Manley approximately 1:30 p.m. on April 22. He did not launder his clothing.

After defendant and Manley were dropped off in Redding by Manley's mother, Manley told defendant that the previous evening, Mrs. Stendal had become ill and Manley had driven her to the hospital. Manley could not explain to defendant why there was blood on the floor of the Stendal residence.

The jury found defendant guilty of first degree murder, rape, and burglary, with an enhancement for great bodily injury, and found true the three charged special-circumstance allegations. After the jury could not agree as to penalty, a mistrial was declared. Defendant renewed his motion for change of venue, which was granted, and retrial of the penalty phase was conducted in Sacramento County.

II. PENALTY-PHASE EVIDENCE

A. The prosecution's case.

The prosecution presented evidence to the Sacramento County jury substantially similar to the evidence presented to the Shasta County jury, including the following: that Mrs. Stendal was last seen alive shortly before 8 p.m. on April 21, 1982; that when she failed to appear the following day for school, a brief search commenced; that the body was discovered on April 22, 1982; and that subsequent forensic examination of the body revealed the injuries described above. The evidence obtained at Mrs. Stendal's residence was presented, as was the testimony of Mrs. Manley and Robert Manley concerning defendant's actions and whereabouts on the evening of the murder. The two witnesses who had observed defendant near the murder scene early on the morning of April 22, 1982, testified. The prosecution presented the evidence of defendant's familiarity with trucker's-knots. In addition, the prosecutor and defense counsel stipulated that in 1980 and 1981, defendant had suffered two second degree burglary convictions, and in 1981 also had been convicted of vehicle theft.

B. The defense case.

The defense presented two witnesses. Defendant's brother Ed testified that defendant did not have difficulty getting "dates." At 9 a.m. on April 22, 1982, Ed returned from a trip to find defendant at the Proctor residence. From that time until 12 p.m., defendant helped Ed repair a vehicle. Defendant did not wash his clothes that morning.

Defendant's mother testified that defendant's father left the family in 1981. Defendant had dropped out of high school after his sophomore year. Defendant's mother characterized him as a follower who was easily led. Defendant's mother had not known him to be hostile or disrespectful to women in general, or to say anything derogatory about Mrs. Stendal in particular.

At the conclusion of the penalty phase, the jury fixed the penalty at death.

DISCUSSION

I. GUILT-PHASE ISSUES

A. Motion for change of venue.

Defendant contends the trial court erred in denying his repeated motions for change of venue.[3] Pursuant to section 1033, subdivision (a), the court must grant a motion for change of venue if "there is a reasonable likelihood that a fair and impartial trial cannot be had in the county." The phrase "reasonable likelihood" in this context "means something less than 'more probable than not,' " and "something more than merely 'possible.' " (*People v. Bonin* (1988) 46 Cal.3d 659, 673.) In ruling on

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[3] After entering a plea of not guilty on August 2, 1982, defendant on September 14, 1982, moved for a change of venue, which motion was denied summarily on September 23, 1982, on the ground the motion did not comply with California Rules of Court, rule 841. On October 8, 1982, defendant filed a second motion to change venue, which the court considered and denied on October 20, 1982. On December 7, 1982, defendant renewed his motion for change of venue, which was heard and denied on that date.

such a motion, as to which defendant bears the burden of proof, the trial court considers as factors the gravity and nature of the crime, the extent and nature of the publicity, the size and nature of the community, the status of the victim, and the status of the accused. (*People v. Edwards* (1991) 54 Cal.3d 787, 807; *People v. Cooper* (1991) 53 Cal.3d 771, 805; *People v. Bonin, supra*, 46 Cal.3d 659, 672-673.)

"On appeal after a judgment following the denial of a change of venue, the defendant must show both that the court erred in denying the change of venue motion, i.e., that at the time of the motion it was reasonably likely that a fair trial could not be had, and that the error was prejudicial, i.e., that it [is] reasonably likely that a fair trial was not *in fact* had. [Citations.]" (*People v. Edwards, supra*, 54 Cal.3d 787, 807, italics added; *People v. Cooper, supra*, 53 Cal.3d 771, 805-806.)

With regard to the first part of the showing required of a defendant on appeal, we employ a standard of de novo review to the trial court's ultimate determination of the reasonable likelihood of an unfair trial. (*People v. Edwards, supra*, 54 Cal.3d 787, 807; *People v. Cooper, supra*, 53 Cal.3d 771, 805-806; *People v. Bonin, supra*, 46 Cal.3d 659, 676-677.) This requires our independent determination of the weight of the five controlling factors described above. (*People v. Bonin, supra*, 46 Cal.3d 659, 676-677; *People v. Balderas* (1985) 41 Cal.3d 144, 177.) With regard to the second part of the showing, in order to determine whether pretrial publicity had a prejudicial effect on the jury, we also examine the voir dire of the jurors. (*People v. Howard* (1992) 1 Cal.4th 1132, 1167; *People v. Anderson* (1987) 43 Cal.3d 1104, 1131; *People v. Balderas, supra*, 41 Cal.3d 144, 177.)

Although defendant was charged with very serious offenses, every capital case presents a serious charge. This factor adds weight to a motion for change of venue but is not dispositive. (*People v. Howard, supra,* 1 Cal.4th 1132, 1167; *People v. Cooper, supra,* 53 Cal.3d 771, 806; *People v. Balderas, supra,* 41 Cal.3d 144, 177.) The nature of the acts committed upon the victim is a factor that would tend to support a change of venue, but not to the degree of a case involving serial murders, for example. (Compare *People v. Jennings* (1991) 53 Cal.3d 334, 360.)

Defendant urges that the second factor, the nature and extent of pretrial publicity, virtually compelled a change of venue. In support of his renewed motion, defendant produced copies of articles appearing in two newspapers (six in the Inter-Mountain News, and approximately twenty in the Redding Record Searchlight, between April 1982 and August 1982) and more than sixty copy-notes from local television or radio broadcasts which aired during the same period. Many of these news reports detailed the condition in which Mrs. Stendal's body was found and the circumstances of her death; several included the circumstance that defendant's palm print had been found at the murder scene, and several reported that the prosecutor intended to seek the death penalty because of the heinous nature of the crime.

The defense also produced the results of a telephone public-opinion survey conducted on September 21 and 22, 1982. The survey revealed that of 169 persons contacted, 136 (or 80 percent of those contacted) had heard of the case; 94 (or 55 percent of those contacted) had heard of an arrest having been made; 52 (or 31 percent of those contacted) had formed an opinion as to defendant's guilt,

and (of those 52) 38 persons (or 70 percent) had formed their opinion from reading the Record Searchlight and 5 other persons had formed their opinion from reading the Inter-Mountain News.

Defendant urges that the results of the survey compelled a change of venue. The degree of exposure indicated by the survey, however, was not greater than in other cases in which a change of venue has not been required. (See, e.g., *People v. Jennings, supra,* 53 Cal.3d 334, 359, 361 [72 percent recalled the offenses and 31 percent believed there was a very strong case against the defendant]; *People v. Coleman* (1989) 48 Cal.3d 112, 135 [46.3 percent recalled the crime and 31.4 percent believed the defendant was probably or definitely guilty].)

An additional consideration is that the impact of the publicity may be mitigated due to the lapse of time between publication or issuance of news reports and commencement of jury selection. (E.g., *People v. Jennings, supra,* 53 Cal.3d 334, 361 [Publicity eleven months prior to trial did not require change of venue]; *People v. Anderson, supra,* 43 Cal.3d 1104, 1130 [danger of prejudice significantly reduced with lapse of five months]; *People v. Welch* (1972) 8 Cal.3d 106, 113-114 [news reports ending just over one month prior to trial did not require venue change].) Passage of time weighs against a change of venue. (*People v. Edwards, supra,* 54 Cal.3d 787, 808.)

In the present case, the lapse of nearly three months between the issuance of the last report on August 17, 1982, and the commencement of jury selection on November 10, 1982, helped dispel the potentially prejudicial effect of the news reports of the killing. Although the

extent and content of the pretrial publicity indicates a potential for prejudice, the circumstances that the reports had abated in the months preceding the trial, and that trial was held in Redding (35 miles from Burney), a larger community not the locus of the crime, lead us to conclude that a change of venue based upon pretrial publicity was not strongly indicated.

The next factor to be considered is the size of the community. " 'The larger the local population, the more likely it is that preconceptions about the case have not become imbedded in the public consciousness.' [Citation.]" (*People v. Jennings, supra,* 53 Cal.3d 334, 363.) The size of the county by itself is not determinative; rather, the critical factor is whether it can be shown that the size of the population is large enough to neutralize or dilute the impact of adverse publicity. (*Ibid.*)

Defendant's trial took place in late 1982. Shasta County, which encompasses 3,850.2 square miles (State of Cal., Cal. Statistical Abstract (1984) table A-1, p. 2), then had a population of approximately 122,100, ranking it 28th out of 58 counties in the state (State of Cal., Cal. Statistical Abstract, *supra,* table B-3, p. 15). As defendant has pointed out, cases involving counties with populations of similar size more frequently have occasioned venue changes than cases involving more populous counties. (See *People v. Balderas, supra,* 41 Cal.3d 144, 178-179.) We do not agree with the suggestion, however, that every case involving the death penalty merits a change of venue if it arises in a county of this size. Therefore, although this factor weighs somewhat in favor of a change of venue, it is not determinative.

The fourth and fifth factors are the respective status and prominence of the defendant and his victim. In the town of Burney, Mrs. Stendal was a well-known and apparently well-liked active participant in the community, had 20 years' experience in the Burney school system, and was described as having "taught everyone's kids." It does not appear that she had any particular prominence or status in the greater-county area outside the small, isolated town (Burney then had a population of approximately 3,000) in which she lived. Defendant also was a long time resident of Burney, whose ties to the community were interrupted only by the fairly brief periods he spent at California Youth Authority facilities. Although he previously had been convicted of several nonviolent felony offenses, and news accounts after the murder reported his prior confinement at the California Youth Authority on a burglary commitment, he was by no means a stranger to, or friendless in, the community (see *People v. Balderas, supra,* 41 Cal.3d 144, 179), and the degree of his prior criminal involvement does not appear to have earned him any great notoriety even in the small community of Burney. Although the respective positions of the victim and defendant within the community might lend support for a change of venue, this factor does not weigh heavily in favor of a change of venue.

Considered in total, the above described factors do not strongly weigh in favor of or against a change, but simply indicate a venue change might have been desirable. It appears that, although he established the possibility of an unfair trial in this venue, defendant failed to carry his burden of proving there was a reasonable likelihood that jurors drawn from Shasta County would have

formed such fixed opinions as a result of the pretrial publicity that they could not make the required determinations with impartiality. (See *People v. Bonin, supra,* 46 Cal.3d 659, 678.)

Considering the relative closeness of the issue, however, we turn next to the question whether any error in the trial court's ruling – that defendant did not carry his burden – would be prejudicial, that is, whether the record demonstrates a reasonable likelihood he did not in fact receive a fair trial. With this purpose in mind, we consider the jury voir dire to determine whether the jurors may have been prejudiced by the pretrial publicity surrounding the case, bearing in mind that no presumption of a deprivation of due process of law arises from juror exposure to publicity concerning the case. (*People v. Daniels* (1991) 52 Cal.3d 815, 853.)

In *People v. Cooper, supra,* 53 Cal.3d 771, prejudice was not shown where only three jurors had been exposed to " 'prejudicial information' " concerning the case and on examination all the jurors had stated they could be fair. (*Id.*, at p. 807.) In *People v. Jennings, supra,* 53 Cal.3d 334, prejudice was not established where voir dire of the selected jurors demonstrated they were not "tainted" by the modest pretrial publicity. (*Id.*, at p. 363.) In *People v. Bonin, supra,* 46 Cal.3d 659, prejudice was not demonstrated where even though prior to trial 10 of the 12 jurors and 3 of the 4 alternates had been exposed to news coverage, most had received indirect and minimal exposure. (*Id.* at p. 678.) In *People v. Anderson, supra,* 43 Cal.3d 1104, no prejudice was found where eight of the selected jurors had no knowledge of the facts or the issues, three of the others had read little about the case, one recalled

the case in general terms but in none of its details, and each juror stated he or she had formed no opinion and could and would reach a decision based on the evidence presented at trial. (*Id.*, at p. 1131.) In *People v. Balderas, supra,* 41 Cal.3d 144, no prejudice was demonstrated where six of the selected jurors professed pretrial ignorance of the case, four recalled reading reports, but none had followed the case or recalled many details. All of the selected jurors stated they could set aside any impressions obtained outside the courtroom and could consider the evidence without being prejudiced by the pretrial publicity. In *People v. Welch, supra,* 8 Cal.3d 106, each of the selected jurors was unfamiliar with the facts, had not formed any opinion of the defendant's guilt or innocence, or stated he or she could act fairly and impartially. (*Id.*, at p. 114.)

In the present case, defendant points out that all but three jurors had watched on television, heard on the radio, or read in the newspapers something concerning the case. Our review of the record reveals, however, that most of those jurors had received only minimal pretrial exposure to the case, that such exposure took place during a period well before commencement of the trial, that the jurors had not been informed of the evidence linking defendant to the case but only that the murder had occurred, and that when questioned on the subject, all of these jurors attested to their ability to put aside everything they had learned about the case and to decide the issues based solely on the evidence presented at trial.

We also observe that, in renewing the motion upon completion of jury selection, defendant did not rely upon the substance of the answers actually given in voir dire to

contend the jurors had formed opinions based upon pretrial publicity; defendant, in fact, acknowledged the assurances of the jurors that they would put aside any prior knowledge of the case. Rather, defendant only reiterated the point made earlier that, based on the percentage of persons answering defendant's telephone poll who indicated they had formed an opinion, it was reasonably likely some of those who actually served on the jury also had formed an opinion, no matter what their responses had been in the voir dire on this subject.

Finally, defendant urges that the circumstance that the trial court granted his motion for a change of venue prior to retrial of the penalty phase suggests the trial court belatedly recognized the true potential for prejudice. The record demonstrates, however, that upon defendant's renewal of his motion at the conclusion of the first trial of the penalty phase, the court expressly granted the motion on the ground that there had been intensive *additional* publicity during the entire guilt and penalty phases of the trial, which the media had attended on a daily basis, and therefore the likelihood of a fair trial in the county had *diminished*.

Having considered the totality of the evidence, we conclude defendant has not met his burden on appeal of demonstrating both that it was reasonably likely he could not receive a fair trial in Shasta County absent a change of venue, and that it was reasonably likely he did not in fact receive a fair trial. Therefore, reversal is not required.

B. Sufficiency of the evidence.

1. First degree murder.

In support of the allegation of first degree murder, the prosecution proceeded upon three alternate theories: premeditation and deliberation, torture murder, and felony murder (based upon the commission of rape and burglary). According to defendant, his guilt was not proved under any of these theories.

Having reviewed the entire record in the light most favorable to the judgment and presuming the existence of every fact the trier of fact reasonably could have deduced from the evidence, we conclude that a rational trier of fact could have found beyond a reasonable doubt the essential elements of defendant's guilt under each of these theories of first degree murder. (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1237; *People v. Johnson* (1980) 26 Cal.3d 557, 576.)

a. Premeditation and deliberation.

In a case, such as the present one, based upon circumstantial evidence, we must decide whether the circumstances reasonably justify the findings of the trier of fact, but our opinion that the circumstances also might reasonably be reconciled with a contrary finding would not warrant reversal of the judgment. (*People v. Perez* (1992) 2 Cal.4th 1117, 1124.)

In order to ascertain whether the evidence is sufficient to sustain a finding of first degree murder based upon premeditation and deliberation, we generally examine whether there is evidence of planning, motive, or

method, although these factors are not exclusive. (*People v. Perez, supra,* 2 Cal.4th 1117, 1125; *People v. Thomas* (1992) 2 Cal.4th 489, 517; *People v. Raley* (1992) 2 Cal.4th 870, 887; *People v. Edwards, supra,* 54 Cal.3d 787, 813-814.) When the record discloses evidence in all three categories, the verdict generally will be sustained. Otherwise, convictions for first degree murder typically have been upheld where there is " 'either very strong evidence of planning, or some evidence of motive in conjunction with planning or a deliberate manner of killing.' [Citations.]" (*People v. Raley, supra,* 2 Cal.4th 870, 887.)

Our review of the record reveals evidence falling within all three categories. With respect to planning, the evidence (the unfiltered cigarette butt found near a window and a handprint on the windowsill) supports an inference defendant spent a period of time just outside Mrs. Stendal's residence observing her, before entering to commit the offenses. Once inside, defendant rendered the victim subject to his complete control by tying her hands and cutting the telephone lines. After binding the victim, defendant had a significant period of time in which to contemplate and plan her eventual death as he engaged in various acts of torture. (See *People v. Raley, supra,* 2 Cal.4th 870, 887.)

Although evidence of defendant's motive is less clear, a rational trier of fact could have determined that defendant's motive in murdering Mrs. Stendal was to avoid detection for the sexual and other physical abuses he had committed against her. (See *People v. Perez, supra,* 2 Cal.4th 1117, 1126; *People v. Raley, supra,* 2 Cal.4th 870, 887; *People v. Turner* (1990) 50 Cal.3d 668, 688.)

Finally, the manner of killing supports a finding of premeditation. The evidence establishes that defendant sequentially strangled the victim – first manually, and then by means of ligature – after subjecting her to prolonged physical abuse through the infliction of various types of wounds, some of which were not random. During the infliction of these wounds, defendant could have quickly dispatched the victim by means of stabbing and beating, had he chosen to do so. These circumstances do not suggest an unreflecting explosion of violence, but rather a preconceived design to kill the victim by the particular means chosen, and to prolong her agony in the process. (*People v. Edwards, supra,* 54 Cal.3d 787, 814; see *People v. Raley, supra,* 2 Cal.4th 870, 887.) Therefore, we conclude the evidence, although circumstantial, affords an adequate foundation for an inference of premeditation and deliberation, and is sufficient to support such a conclusion by a rational trier of fact.

b. Torture murder.

The evidence also is sufficient to support the finding that defendant killed the victim with the intent to torture her. " 'Torture murder is "murder committed with a wilful, deliberate and premeditated intent to inflict extreme and prolonged pain." [Citation.]' " (*People v. Raley, supra,* 2 Cal.4th 870, 888, quoting *People v. Pensinger, supra,* 52 Cal.3d 1210, 1239.) Such intent, considered sufficiently culpable to warrant punishing the perpetrator for first degree murder, is the calculated intent to cause pain for " ' "the purpose of revenge, extortion, persuasion or for any other sadistic purpose." ' " (*People v. Raley, supra,*

2 Cal.4th 870, 888, quoting *People v. Wiley* (1976) 18 Cal.3d 162, 168; see also *People v. Bittaker* (1989) 48 Cal.3d 1046, 1101; *People v. Davenport* (1985) 41 Cal.3d 247, 267.) "However, there must be a causal relationship between the torturous act and death, as Penal Code section 189 defines the crime as murder 'by means of' torture. [Citation.]" (*People v. Pensinger, supra*, 52 Cal.3d 1210, 1239, quoting *People v. Davenport, supra*, 41 Cal.3d 247, 267.)

Defendant, relying upon the evidence that the numerous "drag" knife wounds across the victim's chest apparently were not inflicted for the purpose of causing death and did not cause death, asserts that no causal relationship exists between these torturous acts and Mrs. Stendal's death. This assertion ignores the additional evidence that her death was caused by manual and ligature strangulation after she not only had been bound, beaten, and stabbed in the manner just described, but also had received a series of additional injuries (described more fully below), inflicted over her entire body. The finding of murder-by-torture encompasses the totality of the brutal acts and the circumstances which led to the victim's death. (*People v. Talamantez* (1985) 169 Cal.App.3d 443, 456; see also *People v. St. Joseph* (1990) 226 Cal.App.3d 289, 297; *People v. Hindmarsh* (1986) 185 Cal.App.3d 334, 349.) The acts of torture may not be segregated into their constituent elements in order to determine whether any single act by itself caused the death; rather, it is the continuum of sadistic violence that constitutes the torture. (*People v. Talamantez, supra*, 169 Cal.App.3d at p. 456.)

In the present case, the victim was subjected to strangulation by two different methods, her wrists were bound

so tightly as to cut into her skin, she was beaten in the face severely enough to have caused her eyes to be swollen shut and her lips to be swollen, she received severe blows to other parts of her body, and she suffered repeated, incision-type stab wounds to her neck, chest, and breast area. We conclude that this evidence amply supports the finding that Mrs. Stendal's death was brought about by torture.

Defendant additionally contends the trial court erred in instructing the jury pursuant to the then-current version of CALJIC No. 8.24,[4] because the evidence did not establish that the torture caused the victim's death. As explained above, there was ample evidence to demonstrate that the murder was accomplished by means of torture. Thus, the trial court did not err in giving this instruction.

Although it is in the context of his challenge to the sufficiency of the evidence to support the torture-murder special-circumstance finding that defendant also questions the sufficiency of the evidence to establish the *intent* to torture, for the sake of convenience we review this related claim at this point in our opinion, because intent to torture also must be present in order to sustain a conviction of first degree murder on a theory of torture

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[4] The version of CALJIC No. 8.24 (Cal. Jury Instns., Crim. (4th ed. 1979)), as read to the jury, provided in pertinent part: "The essential elements of [torture] murder are one, the act or acts which caused the death must involve a high degree of probability of death, and two, the defendant must commit such act or acts with the intent to cause cruel pain and suffering for the purpose of revenge, extor[t]ion, persua[s]ion or for any sadistic purpose."

murder. Again relying exclusively on the evidence of "drag" marks on the victim's chest, defendant urges that the specific intent to torture may not be inferred solely from the condition of the victim's body, because even severe wounds may be as consistent with "an explosion of violence" as with torture. (*People v. Mincey* (1992) 2 Cal.4th 408, 432; *People v. Raley, supra,* 2 Cal.4th 870, 888; *People v. Davenport, supra,* 41 Cal.3d 247, 268.) Intent is a state of mind which, unless established by the defendant's own statements, must be proved by the circumstances surrounding the commission of the offense (*People v. Mincey, supra,* 2 Cal.4th 408, 433; see also *People v. Pensinger, supra,* 52 Cal.3d 1210, 1239), which include the severity of the victim's wounds. (*People v. Mincey, supra,* 2 Cal.4th 408, 433.)

In the present case, the coroner testified that many of the victim's wounds, particularly the knife "drag" marks, were inflicted while she still was alive but after she had been rendered incapable of avoiding further attack. The wounds revealed that a relatively slow, methodical approach had been employed in their infliction, rather than their having resulted from sudden, explosive violence. The nature of many of the wounds, including the repeated blows to the face and to other parts of the body, as well as the knife "drag" marks, suggests that they were administered over a substantial period of time and that defendant intended to inflict cruel pain and suffering on the victim. Considered with the circumstances that the victim was isolated and prevented from resisting or escaping during these acts, this evidence establishes defendant's intent to torture the victim.

c. Felony murder.

The evidence also is sufficient to support a finding of first degree murder based upon the theory of felony murder, whether the underlying felony is considered to be rape or burglary. "We have required as part of the felony-murder doctrine that the jury find the perpetrator had the specific intent to commit one of the enumerated felonies, even where that felony is a crime such as rape. [Citations.]" (*People v. Hernandez* (1988) 47 Cal.3d 315, 346.) It also is established that the killing need not occur in the midst of the commission of the felony, so long as that felony is not merely incidental to, or an afterthought to, the killing. (*Id.*, at p. 348; see *People v. Hayes* (1990) 52 Cal.3d 577, 631.)

Defendant urges that the only items of evidence linking him to the commission of the rape are the unfiltered cigarette butt found near the residence, his presence in the residence on the night in question, and certain marks on his legs which an expert opined were similar to marks seen on other perpetrators of sexual assaults. Defendant ignores the additional circumstantial evidence that a short time prior to the commission of the present offenses, he participated in making telephone calls of a harassing nature to various persons and was present when his companion made a call of a sexual nature to the murder victim. On the evening the offenses were committed, defendant informed one witness that he was going to pick up a woman, and another that he was going to "get a piece of butt." The evidence that Mrs. Stendal was forcibly raped, prior to her death, was uncontradicted. This evidence, considered with the circumstances that the victim was tied in a manner consistent with defendant's

formal education in the art of trucker's-knots, that the abrasions below defendant's knees and above his right knee were incurred by defendant while his legs were unclothed, and that these abrasions were consistent with injuries observed in other cases of sexual assault, amply support the jury's implied finding that defendant specifically intended to commit rape and that the rape was not a mere incident of the murder.

Defendant also urges there is insufficient evidence to support a finding of felony murder based upon the underlying felony of burglary because there is no evidence demonstrating he entered the residence with the requisite felonious intent (§ 459), in this case the intent to commit rape. Such intent usually must be inferred from all the facts and circumstances revealed by the evidence, because only rarely can it be proved directly. (*People v. Matson* (1974) 13 Cal.3d 35, 41.) In view of (1) the previously described evidence of defendant's conduct in the hours preceding his entry of the Stendal residence, (2) the evidence he spent a period of time immediately outside the residence, presumably contemplating his next act, and (3) the methodical manner in which defendant isolated the victim and committed the rape, the nonsexual physical abuse, and finally the murder itself, it is clear that a rational trier of fact could conclude defendant had the requisite felonious intent prior to his entry into the residence.

C. Special circumstances issues.

1. Torture-murder special circumstance.[5]

Defendant contends the trial court erred in failing to instruct the jury that in order to find the special circumstance charged under section 190.2, subdivision (a)(18) (murder involving torture), to be true, it had to determine that defendant possessed the intent to torture Mrs. Stendal. (*People v. Davenport, supra,* 41 Cal.3d 247, 271.) The jury in defendant's case was instructed that in order to find the torture-murder special circumstance true, it must be proved: "1. That the murder was intentional, and [¶] 2. That the murder involved the infliction of torture. [¶] To prove the infliction of torture, the infliction of extreme physical pain must be proved no matter how long its duration. [¶] Awareness of pain by the deceased is not a necessary element of torture." (CALJIC No. 8.81.18 (4th ed. 1979).)

Although this instruction did not specifically inform the jury that the concept "infliction of torture" included an "intent to torture," nothing in the instruction was inconsistent with that understanding of the concept. Similarly to the juries in *People v. Mincey, supra,* 2 Cal.4th 408, 455, and *People v. Wade* (1988) 44 Cal.3d 975, 994, the present jury was instructed at the guilt phase both as to

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[5] As previously noted, we have discussed defendant's attack on the sufficiency of the evidence of the torture-murder special circumstance, specifically that the evidence was insufficient to establish intent to torture, in resolving defendant's related claim that the evidence was insufficient to sustain his conviction of first degree murder on a theory of torture murder. (See *ante,* pp. ___-___ [typed maj. opn. at pp. 30-31].)

first degree torture murder and as to the torture-murder special circumstance. The first degree torture murder instruction specifically informed the jury that an "intent to cause cruel pain and suffering" (CALJIC No. 8.24 (4th ed. 1979)) was a required element of the offense. As in *Wade*, "nothing in the present record suggests the jury in this case was likely to have drawn any . . . distinction in the use of the term 'torture' in the two instructions." (44 Cal.3d at p. 994.) Also, as in *Wade*, "neither the prosecutor nor defense counsel suggested at any point that a torture-murder special circumstance could be established without first proving an intent to torture." (*Id.*, at pp. 994-995.)

To be sure, as in *People v. Pensinger, supra*, 52 Cal.3d 1210, 1254-1255, and *People v. Wade, supra*, 44 Cal.App.3d 975, 990, the jury was instructed on multiple theories of first degree murder, and therefore the intent to torture may not be established on the mere basis of the guilt verdict on the first degree murder charge. In *People v. Pensinger, supra*, 52 Cal.3d 1210, we reversed the special circumstance finding because, in addition, neither the prosecutor nor defense counsel discussed the issue whether the defendant had intended to torture the victim, either in the context of the murder-by-torture theory of first degree murder or the torture-murder special circumstance. (*Id.*, at p. 1255.)

In the present case, by contrast, the prosecutor in closing argument repeatedly stressed that defendant's intent was to cause cruel pain. For example, the prosecutor asserted: "He wanted to murder her but he wanted her to die slowly and he wanted her to feel her death." Defense counsel also repeated the instruction on intent to

torture. Finally, in rebuttal, the prosecutor reiterated that the prosecution's evidence had demonstrated the intent to torture and also the intent to kill the victim. In further contrast to *People v. Pensinger, supra*, 52 Cal.3d 1210, 1255, there was overwhelming evidence of intent to torture, as described above. In light of the various instructions and the entire trial record, we conclude there is no reasonable likelihood that the jury understood the torture-murder special-circumstance instruction as not requiring a finding of intent to torture. (*People v. Mincey, supra*, 2 Cal.4th 408, 455; see *Estelle v. McGuire* (1991) 502 U.S. ___, ___ [116 L.Ed.2d 385, 399, 112 S.Ct. 475, 482]; *People v. Kelly* (1992) 1 Cal.4th 495, 525.)

Defendant's claim that the evidence is insufficient to support the finding of a torture-murder special circumstance must be rejected. "Proof of a murder committed under the torture-murder special circumstance . . . requires proof of first degree murder (§ 190.2, subd. (a)), proof the defendant intended to kill and to torture the victim (§ 190.2, subd. (a)(18)), and the infliction of an extremely painful act upon a living victim. (*Ibid.*)" (*People v. Davenport supra*, 41 Cal.3d 247, 271.) Unlike the section 189 definition of murder by torture, section 190.2, subdivision (a)(18), requires that the defendant have acted with intent to kill. (41 Cal.3d at p. 271.)

As discussed in detail above, there was ample evidence to support the jury's finding of first degree murder, and to establish that defendant intended to torture his victim, did so while she still was alive, and intended to kill her.

2. Felony-murder special circumstances.

Defendant contends the trial court erred in failing to instruct the jury that in order to find the special circumstances charged under section 190.2, subdivision (a)(17)(iii) (rape) and (vii) (burglary), to be true, it had to determine that defendant possessed the intent to kill Mrs. Stendal. Subsequent to the trial in this case, such an instruction was required by this court's decision in *Carlos v. Superior Court* (1983) 35 Cal.3d 131, 142. Defendant also contends that even had the instructions correctly reflected the intent requirement, there is insufficient evidence to support findings of intent, and that these two special circumstance findings therefore must be set aside.

Defendant's claims are rendered moot by this court's intervening decision in *People v. Anderson, supra,* 43 Cal.3d 1104, 1147, which expressly overruled *Carlos* on this point. In *Anderson,* we held that "intent to kill is not an element of the felony-murder special circumstance; but when the defendant is an aider and abettor rather than the actual killer, intent must be proved." (*Ibid.*) The rule enunciated in *Anderson* applies both to crimes committed after the *Anderson* decision and to crimes committed prior to the *Carlos* decision. (*People v. Hamilton* (1988) 46 Cal.3d 123, 143, fn. 5; *People v. Easter* (1987) 197 Cal.App.3d 183, 185-187; see *People v. Ramirez* (1990) 50 Cal.3d 1158, 1182-1183.) The offenses in this case were committed prior to *Carlos.*

In the present case, the evidence was susceptible of only two reasonable interpretations – that defendant was the actual killer or that he was not at all involved in the

crime; there was no evidence he participated only as an aider and abetter. Accordingly, intent to kill was not an element of the felony-murder special circumstances charged against defendant, and the trial court was not required to instruct on such intent as an element of the alleged special circumstances. (*People v. Hamilton, supra,* 46 Cal.3d 123, 142-143; *People v. Easter, supra,* 197 Cal.App.3d 183, 185.) Although the issue whether there was sufficient evidence to support a finding that defendant possessed the intent to kill therefore is moot in the context of defendant's present contention, we have concluded (as described above) that the evidence is sufficient to establish defendant's intent to kill.

In the present case, because defendant was guilty of murder in the perpetration of the rape, the rape-murder special circumstance properly was found to have been proved if it was established that defendant intended to commit rape, and the rape and the killing were part of one continuous transaction. (See *People v. Hayes, supra,* 52 Cal.3d 577, 631-632; *People v. Hernandez, supra,* 47 Cal.3d 315, 348.) As is amply demonstrated by the evidence, a rational trier of fact could have found that defendant possessed the specific intent to commit rape, and that the rape was not merely incidental to the killing, but part of a continuous course of violence against the victim, culminating in her murder.

The same rule applies with regard to the finding of the burglary-murder special circumstance. (*People v. Hayes, supra,* 52 Cal.3d 577, 632; see *People v. Hernandez, supra,* 47 Cal.3d 315, 348.) A rational trier of fact properly could have found both that defendant intended to commit burglary, and that the burglary of the residence and

the eventual killing were part of one continuous transaction. (See *People v. Hayes, supra,* 52 Cal.3d 577, 632.)

D. Jury deliberations.

1. Substitution of a juror.

The jury retired to deliberate at 3:40 p.m. on December 15, 1982, recessing for the day after less than one hour of deliberations. The following morning, before further deliberations, the court announced that one of the jurors had become ill, and both parties stipulated to his replacement by an alternate juror. After the alternate was sworn, the trial judge advised the jury to resume its deliberations, stating it "would be helpful and in connection with commencing your deliberations again, that you kind of start, start from scratch, so to speak, so that Mr. Rhoades has the benefit of your thinking as well as give him an opportunity for his input also." The jury deliberated two and one-half days after substitution of the alternate juror before returning its verdict.

Defendant contends the court's admonition did not embody all elements of the instruction required by *People v. Collins* (1976) 17 Cal.3d 687. In *Collins,* this court directed that "the court instruct the jury to set aside and disregard all past deliberations and begin deliberating anew. The jury should be further advised that one of its members has been discharged and replaced with an alternate juror as provided by law; that the law grants to the People and to the defendant the right to a verdict reached only after full participation of the 12 jurors who ultimately return a verdict; that this right may only be assured if the jury begins deliberations again from the

beginning; and that each remaining original juror must set aside and disregard the earlier deliberations as if they had not been had." (*Id.,* at p. 694; see also *People v. Anderson* (1990) 52 Cal.3d 453, 482-483.)

Defendant's contention must be rejected. By instructing the jury to "kind of start, start from scratch, so to speak," the court implied that the jury should disregard its previous deliberations. (*People v. Odle* (1988) 45 Cal.3d 386, 405.) By providing this directive in the context of advising the jurors to give the alternate the benefit of the other jurors' thoughts, as well as to give the jurors the benefit of the alternate's input, the court further emphasized that deliberations were to begin anew with the full participation of the alternate. Furthermore, the court did not suggest that the jury might not have to reconsider any matter already considered or decided. (Compare *People v. Odle, supra,* 45 Cal.3d 386, 405 [court's comments erroneously implied that the alternate should be brought "up to speed" on matters already discussed and possibly decided].)

Finally, even assuming the court erred, no prejudice occurred. In determining whether *Collins* error was prejudicial, we may consider whether the case is a close one and compare the time the jury spent deliberating before and after the substitution of the alternate juror. (*People v. Odle, supra,* 45 Cal.3d 386, 405; *Griesel v. Dart Industries, Inc.* (1979) 23 Cal.3d 578, 585.) In *People v. Odle, supra,* 45 Cal.3d 386, we concluded there was no prejudice where the case against the defendant was overwhelming and where the jury deliberated only part of one afternoon prior to substitution of the alternate juror and two and

one-half days thereafter. (*Id.*, at p. 406.) In *People v. Collins, supra*, 17 Cal.3d 687, itself, we determined the error was not prejudicial where the case against the defendant was very strong, and the jury had deliberated little more than one hour prior to substitution of the alternate and had returned a verdict after several additional hours. (*Id.*, at pp. 690, 697.)

In the present case, the evidence against defendant was extremely strong. The jury had deliberated less than one hour prior to substitution of the alternate, and continued to deliberate for two and one-half days thereafter. It is not reasonably probable the outcome of the trial would have been different had the jury been instructed, in more exact language, to begin its deliberations anew. (See *People v. Collins, supra*, 17 Cal.3d 687, 697; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

2. The trial court's comments on the jury's numerical division.

At 4 p.m. on Thursday, December 16, 1982, the first full day of deliberations, the jury conveyed a message to the court that the jury had reached an impasse and was requesting guidance as to how to proceed. The court, stating it had received the jury's message, requested that the jury foreman inform the court as to the numerical division of the jurors, without revealing the respective numbers for a guilty verdict.[6]

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[6] The record of the exchange is as follows:

"THE COURT: All right, we have our jurors back in the box. Mr. Forrester, I received your message as to a numerical count. However, to properly appreciate your message, I'm going to have to ask you a few questions, all right?

"THE FOREMAN: Okay.

"THE COURT: Have the jurors voted on the first count, that would be the issue of murder?

"THE FOREMAN: Uh-huh.

"THE COURT: Without telling me which way that numeral [sic] count is, would you tell me what the numerical count is. Don't tell me which way, but what is the numerical count?

"THE FOREMAN: Eleven to one.

"THE COURT: Eleven to one. All right, now, have the jurors taken a vote on the Count II, the rape charge?

"THE FOREMAN: No, we haven't.

"THE COURT: Have the jurors taken a vote as yet on Count III, the burglary charge?

"THE FOREMAN: No, we haven't.

"THE COURT: All right, now in connection with the – well, I think with that information presented to the Court that it would be of importance that if at the moment – well, let me ask you this. Where do you think you are at the moment as far as the numerical count on the eleven to one on the first charge, the count of murder? Do you think that further consideration –

"THE FOREMAN: Yeah, we just – we're kind of at a standstill."

At this point the court, indicating that it was not unusual in a case of this nature for jurors to deliberate longer than a single day, recessed the jury until the following day.

Defendant contends the court's inquiry into the jury's numerical division impaired the fairness of the trial. "[T]he practice of inquiring into the jury's numerical division, without finding out how many are for conviction and how many for acquittal, was expressly approved in [*People v.*] *Carter* [(1968) 68 Cal.2d 810, 815]." (*People v.*

Rodriguez (1986) 42 Cal.3d 730, 776.) Such inquiry is justified in the discharge of the court's "statutory responsibility of assuring that a verdict is rendered 'unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree.' (Pen. Code, § 1140.)" (*People v. Carter* (1968) 68 Cal.2d 810, 815.)

Although, as defendant points out, the rule is otherwise in federal court (see *Brasfield v. United States* (1926) 272 U.S. 448 [71 L.Ed. 345, 47 S.Ct. 135]), we previously have explained that this federal rule is not binding on the states. (*People v. Rodriguez, supra,* 42 Cal.3d 730, 776, fn. 14.)[7] In view of the circumstance that the court inquired in a neutral manner as to the numerical count in order to determine whether further deliberations would be productive, we decline to disapprove the practice as it was employed in the present case.

We also disagree with defendant's contention that the court's order declaring a recess until the following morning, once it had ascertained the vote was split, implied the court had found "something wrong" with the vote which might be remedied by a night's rest. The determination, pursuant to section 1140, whether there is a " 'reasonable probability' " of agreement, rests within the

[7] In his supplemental brief, defendant urges that we reconsider the California practice permitting such inquiry, but he also acknowledges we have rejected similar requests in other recent cases. (See, e.g., *People v. Price* (1991) 1 Cal.4th 324, 467; *People v. Breaux* (1991) 1 Cal.4th 281, 319.) We discern no reason, based upon the circumstances of the present case, to reconsider this issue.

sound discretion of the trial court. (*People v. Miller* (1990) 50 Cal.3d 954, 994.) Although the court must take care to exercise its power without coercing the jury into abdicating its independent judgment in favor of considerations of compromise and expediency (*ibid.*), the court may direct further deliberations upon its reasonable conclusion that such direction would be perceived " 'as a means of enabling the jurors to enhance their understanding of the case rather than as mere pressure to reach a verdict on the basis of matters already discussed and considered.' [Citation.]" (*Ibid.*) Nothing in the trial court's comment in the present case properly may be construed as an attempt to pressure the jury to reach a verdict; the court correctly concluded there was a reasonable probability the jurors could agree on a verdict.

3. The trial court's comments on defendant's testimony.

The jury continued its deliberations on Friday, December 17, 1982, at one point requesting that the instructions be reread. At 4:20 p.m. that day, the court was informed that one of the jurors sought to disqualify herself on the ground she was "the one," that is, the person not in agreement with the other eleven. After explaining that this circumstance afforded no basis for disqualification, the trial judge commented on the complexity of the case and the relatively brief period the jury had deliberated, reread the instruction as to defendant's entitlement to the individual opinion of each juror, and, noting the lateness of the hour, recessed the deliberations of the jury.

Prior to the resumption of jury deliberations on Monday morning, December 20, the court delivered the following comments:

"Ladies and gentlemen of the jury and the alternates, for the purpose of assisting you in deciding this case, I am permitted by the Constitution of California to comment on the issues, the evidence and the testimony and credibility of any witness. And it occurred to me that before you retired to continue your deliberations this morning that some comment along those lines might be of some assistance to you.

"Now, you should keep in mind that my comments are intended to be advisory only, and are not binding on you, as you are the exclusive judges of the questions of fact submitted to you and of the credibility of the witnesses. You should disregard any or all of the comments, if you do not agree, if they do not agree with your views of the evidence and the credibility of the witnesses."

After outlining the difference between lawful and unlawful killing, the court stated there was no question in this case but that the killing of the victim was unlawful. The court then indicated the issues before the jury were whether the prosecution had proved beyond a reasonable doubt that defendant was legally responsible for the killing, and if so, in what degree, and if in the first degree, whether the prosecution had proved the special circumstances. The court also stated the jury must determine whether the prosecutor had proved the rape and burglary charges beyond a reasonable doubt.

The court continued: "Now, in that connection, there have been several statements attributed to the defendant

out of court concerning his whereabouts and activities on the night of April the 21st and the early morning hours of April the 22nd. These statements attributed to him are inconsistent with one another and are also inconsistent with his testimony here in court concerning his activities that evening and in the early morning hours of April the 22nd.

"Now, the district attorney has placed him in the house of Bonita Bergh Stendal through three palm prints; one bloody right palm print, which I think Mr. Collins testified to, was created by blood being on the palm first and then transferred to the booklet. In addition to that, Mr. Collins has testified there were two dry palm prints. By that, they were latent, there was a left palm print, which was latent, by that it had a chemical, had to be applied to one of the booklets to raise that palm print to where it could be seen. And another dry palm print of the right palm. Again, one that could only be seen after being treated with chemicals, and that was on a different booklet.

"Now, the defendant has testified and given you an explanation as to what he did in that house that morning which explains the presence of the bloody palm print, but does not explain the presence of the two dry or latent palm prints. Under those circumstances, I have difficulty in believing the testimony of the defendant. Now, again, my comments are intended to be advisory only and are not binding on you as you are the exclusive judges of the questions of fact submitted to you and of the credibility of the witnesses. You should disregard any or all of the comments that I've made if they do not agree with your

views of the evidence and the credibility of the witnesses."

The jury then commenced its deliberations for that day. After recessing for lunch and reconvening at 2:55 p.m., it informed the court it had reached a verdict. Prior to the seating of the jury, defendant's counsel stated he had an objection to the court's comments. The court admonished counsel that he should have made his objection earlier. Defendant contends his right to due process of law was violated because he was not apprised in advance of the court's intention to comment, and that the content of the court's comments fell outside the range permitted by our decisions. We do not agree that defendant's right to due process of law was violated by the court's failure to provide advance notice of its intended comments. Although, as pointed out by defendant, the trial court was required by statute to afford advance notice of intended jury instructions, defendant has not directed our attention to any similar statutory or judicial requirement pertaining to judicial comment. In fact, because the statutory provision authorizing judicial comment is contained in the same section as that governing jury instructions (§ 1127; see § 1093, subd. (f)), and the Legislature while expressly providing that courts are to afford notice of jury instructions (§ 1093.5) has declined to impose such a requirement in the case of judicial comment, we may presume no such requirement was intended by the Legislature as to the latter subject. Defendant relies primarily on *People v. Rodriguez, supra,* 42 Cal.3d 730, in which the trial court provided the parties with advance notice of its intended comments, and indeed, numerous drafts of the comments ultimately

made in that case were prepared by the prosecutor and discussed at length by court and counsel in advance. (*Id.*, at p. 774, fn. 13.) Although it would be better practice to afford counsel advance notice, we decline defendant's suggestion that we elevate our recitation of the particular procedural aspects of the *Rodriguez* case to the status of a legal requirement.

Next, defendant challenges the substance of the trial court's comments. Article VI, section 10, of the California Constitution permits the court to "make such comment on the evidence and the testimony *and credibility of any witness* as in its opinion is necessary for the proper determination of the cause." (Italics added.) The purpose of this provision is to allow the court "to utilize its experience and training in analyzing evidence to assist the jury in reaching a just verdict. [Citations.]" (*People v. Cook* (1983) 33 Cal.3d 400, 407.) In *People v. Rodriguez, supra,* 42 Cal.3d 730, 765-770, we overruled that portion of *People v. Cook, supra,* 33 Cal.3d 400, 413, which held that a trial court may no' make *any* comment on the evidence once the jury has announced it has reached an impasse in deliberations, and concluded that although a trial court may not directly express an opinion on the ultimate issue of guilt or innocence of the accused at any stage of the trial, it is not prohibited from appropriate comment *simply because the jury has indicated an initial deadlock in its deliberations.* (*People v. Rodriguez. supra,* 42 Cal.3d at pp. 769-770; see *People v. Melton* (1988) 44 Cal.3d 713, 735.)

In generally summarizing the permissible contours of constitutionally authorized judicial comment, we observed in *People v. Rodriguez, supra,* 42 Cal.3d 730, that "the decisions admonish that judicial comment on the

evidence must be accurate, temperate, nonargumentative, and scrupulously fair. The trial court may not, in the guise of privileged comment, withdraw material evidence from the jury's consideration, distort the record, expressly or impliedly direct a verdict, or otherwise usurp the jury's ultimate factfinding power. [Citations.]" (*Id.*, at p. 766; *People v. Gates* (1987) 43 Cal.3d 1168, 1207.)

In *People v. Rodriguez, supra*, 42 Cal.3d 730, we also noted that a trial court has "broad latitude in fair commentary, so long as it does not effectively control the verdict. For example, it is settled that the court need not confine itself to neutral, bland, and colorless summaries, but *may focus critically on particular evidence*, expressing views about its persuasiveness. [Citations.]" (*Id.*, at 768, italics added.) Therefore, the circumstance that in the present case, the trial court chose to single out for particular emphasis the evidence concerning the presence of defendant's fingerprints at the crime scene, and defendant's inconsistent testimony, did not render its comments improper. As noted in *Rodriguez*, " '[A] judge may restrict his comments to portions of the evidence or to the *credibility of a single witness* and need not sum up all the testimony, both favorable and unfavorable. [Citations.]' " (*Id.*, at p. 773, italics added.)

In the present case, the trial court essentially observed that defendant had made inconsistent statements concerning his whereabouts during the pertinent period, and that defendant's testimony as to his presence in the residence, while explaining the presence of the bloody palm print, did not explain the presence of the two dry or latent palm prints, causing the trial court to entertain doubts as to defendant's credibility. The trial

court did not inaccurately state or distort any testimony (*People v. Rodriguez, supra*, 42 Cal.3d 730, 766, 769; *People v. Cook, supra*, 33 Cal.3d 400, 408), and its comment that defendant's testimony "explains the presence of the bloody palm print" permitted an inference more helpful to defendant than the jury might have drawn in the absence of the comment. Although the court commented upon defendant's credibility in a specific context, it did not comment on defendant's guilt or innocence, nor did it direct that the jury reach a given verdict.[8] Moreover, both prior to and after its comments, the court admonished the jury that it was free to disregard those comments. We

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[8] The present case is clearly distinguishable from *People v. Flores* (1971) 17 Cal.App.3d 579, 588, in which the appellate court reversed the defendant's conviction for possession of heroin, based upon the trial court's comments on the evidence. In that case, the sole prosecution witness, a police officer, testified he saw the defendant throw away a packet of heroin, and the defendant testified he did not do so. Upon learning that the jury's vote was divided five to seven, the court told the jury that in its opinion it was a very simple, straightforward case, that the court perhaps had heard more evidence than the jury had because the court had "been in this business for some period of time," that it was really a question who was telling the truth, that if the jury believed the officer who testified he saw the defendant throw the packet of heroin away, it must believe the defendant guilty, that defendant's explanation of his behavior in the presence of the officer was not credible, that the defendant had a motive to lie whereas the officer did not, that the defendant had not provided any indication why the officer had a motive to lie, and that the trial court "would not have spent two minutes in deciding this case because I would have decided that the defendant was guilty." (*Id.* at p. 584, fn. 2, italics omitted.)

We believe the comments made by the trial court in the present case do not begin to approach this level of intervention in the jury's decisionmaking.

conclude that the trial court's remarks fell within the scope of the constitutional privilege.

II. PENALTY-PHASE ISSUES

A. Alleged prosecutorial misconduct.

Defendant asserts the prosecutor committed misconduct in closing argument, when he stated the following: "[C]ircumstantial evidence is the best evidence in the world, if the circumstantial evidence is good enough. [¶] And in this case, of course, we've got the best circumstantial evidence you're ever going to get." Defendant objects to the designation of this evidence as the "best evidence in the world," but acknowledges the jury later was correctly instructed according to CALJIC No. 2.00 (1979 rev.) that: "Both direct evidence and circumstantial evidence are acceptable as a means of proof. Neither is entitled to any greater weight than the other." Any misapprehension on the part of the jury would have been corrected by this instruction. Furthermore, because defendant did not timely object or request an admonition, any error is deemed waived on appeal. (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1077; *People v. Hendricks* (1988) 44 Cal.3d 635, 650.) Defendant's claim that the prosecutor's statement constituted an improper expression of his personal belief concerning this evidence must be rejected on the same ground.

Defendant next asserts the prosecutor's argument violated the rule in *People v. Davenport, supra,* 41 Cal.3d 247, 288-290, by representing that the absence of the following circumstances in mitigation constituted factors

in aggravation under section 190.3: any mental or emotional disturbance on the part of defendant (factor (d)), the victim's participation in or consent to the homicidal act (factor (e)), and any circumstances causing defendant reasonably to believe in moral justification for his conduct (factor (f)). Although in *Davenport* we admonished that such argument should not be permitted "in the future" (*Id.*, at p. 290), we nevertheless have applied the rule to cases tried, as was the present case, prior to *Davenport*. *People v. Beardslee* (1991) 53 Cal.3d 68, 112.)

We observe, as we have in the past, that defendant's failure to object to the challenged remarks precludes a claim of prosecutorial misconduct. (*People v. Visciotti* (1992) 2 Cal.4th 1, 79; *People v. Gallego* (1990) 52 Cal.3d 115, 200; *People v. Rodriguez, supra,* 42 Cal.3d 730, 790.) Even assuming, as defendant has urged in his supplemental brief, that *Davenport* error served to exacerbate so-called *"Brown"* error (*People v. Brown* (1985) 40 Cal.3d 512 (revd. on other grounds in *California v. Brown* (1987) 479 U.S. 538 [93 L.Ed.2d 934, 107 S.Ct. 837]); see discussion, *post*), entitling defendant to review of his claim of error despite his failure to object (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1035, fn. 16), there is no reasonable possibility the prosecutor's argument could have prejudiced the jury's sentencing decision. First, in view of the instructions on aggravating and mitigating factors described more fully below, there is no reasonable likelihood the jury would have been misled by the prosecutor's comments concerning the nature of the weighing process. (*People v. Clair* (1992) 2 Cal.4th 629, 662-663.) Second, the jury was instructed to consider the enumerated factors only "if applicable," allowing the jury to assign whatever

weight was appropriate to each particular factor. (*People v. Gallego, supra*, 52 Cal.3d 115, 200; *People v. Brown* (1988) 46 Cal.3d 432, 454-456.) In light of the nature of the aggravating evidence that properly was introduced, we conclude it is not reasonably possible that any mischaracterization by the prosecutor could have influenced the sentencing decision of a reasonable jury. (*Id.*, at p. 456.)

Defendant also complains the prosecutor impermissibly offered as a factor in aggravation the nonstatutory ground that defendant showed "absolutely no remorse."[9] Where a prosecutor does not suggest that a defendant's lack of remorse should be considered a factor in aggravation, he or she properly may comment on the lack of remorse. (*People v. Gallego, supra*, 52 Cal.3d 115, 197; *People v. Carrera* (1989) 49 Cal.3d 291, 339; see *People v. Sully* (1991) 53 Cal.3d 1195, 1249.)

The record discloses that defendant's objection to the prosecutor's remark was sustained. The trial court denied defense counsel's request for an additional curative instruction on the basis that the prosecutor had not

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[9] The prosecutor's comment in context is as follows: "And let me suggest that in this case, there is no basis for sympathy for William Proctor. This is what he does on April 21st, 1982. That's what he does on April 21st. On April 22nd, what's he do? He shows absolutely no remorse." After the court sustained the defense objection, the prosecutor continued: "What does he do on the 22nd? He goes about his business like nothing happened. He goes to Redding. He goes with Bob Manley. And they go there for the purpose of having fun. [¶] The defendant spent April 22nd, 1982, having fun, less than twenty-four hours after he did that, and I submit there is no basis for sympathy for William Proctor in this case."

claimed defendant's lack of remorse was a factor in aggravation, the court explaining it had sustained the objection because the statement constituted a conclusion.

We conclude the trial court was correct in ruling that the prosecutor had not cited lack of remorse as a factor in aggravation, although the court did err in sustaining the defense's objection that the prosecutor's statement expressed an impermissible conclusion. Thus, the trial court did not commit error in refusing defendant's request for an additional instruction or admonition.

Finally, defendant urges that the prosecutor committed prejudicial misconduct by erroneously claiming that the evidence of defendant's past demonstrated that he "is a violent person."[10] Defendant's failure to object and request a curative instruction or admonition waives any claim he might have on appeal. (*People v. Sully, supra*, 53 Cal.3d 1195, 1248; *People v. Rodriguez, supra*, 42 Cal.3d 730, 790.)

Nonetheless, assuming defendant timely had objected, we reject defendant's claim on the merits. We conclude that the prosecutor's remark was justifiable based

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[10] After canvassing the factors supporting imposition of the death penalty, the prosecutor commented: "Now, I submit that there is nothing that has been presented to you that would extenuate this crime. There is nothing about the defendant's background that you heard that would extenuate this crime. [¶] According to his aunt, he was a normal, average boy growing up, and his mother said that, essentially, as I recall. The only thing you know about his background is that he's had a little history of burglary, takes things that don't belong to him, and he is a violent person. That's what you know about his background. To me, that is not extenuating circumstances."

on the extreme violence displayed by defendant in committing the present offenses. The prosecutor earlier had informed the jury that the circumstance of defendant's lack of any history of violence was a factor in mitigation. Although the prosecutor made the comment regarding defendant's being a violent person while discussing his background, it is apparent from the context of the entirety of the prosecutor's remarks that he was referring to defendant's conduct in the present case in characterizing defendant as a "violent person."

B. Instructional Error.

1. Instruction on aggravating and mitigating factors.

Defendant contends the court's instruction of the jury pursuant to former CALJIC No. 8.84.2 (4th ed. 1979 rev.)[11]

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[11] The court gave the 1979 revised version of former CALJIC No. 8.84.2, as follows: "[I]t is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed upon the defendant. [¶] After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account, and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed. [¶] If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death. However, if you determine that the mitigating circumstances outweigh the aggravating circumstances, you shall impose a sentence of confinement in the state prison for life without possibility of parole. [¶] Before you may consider a particular aggravating circumstance to be true, you must be satisfied of the existence of that aggravating circumstance beyond a reasonable doubt."

violated his Eighth Amendment right under the federal Constitution to a constitutionally reliable determination of penalty, because the instruction may have confused the jury concerning the nature of the process of weighing aggravating and mitigating circumstances.

In *People v. Brown, supra* 40 Cal.3d 512, we upheld the constitutionality of section 190.3, while acknowledging that an instruction incorporating the mandatory language of the section "might mislead jurors as to the scope of their sentencing discretion and responsibility." (*People v. Bonin supra*, 46 Cal.3d 659, 706; *People v. Hamilton* (1988) 45 Cal.3d 351, 370.) We expressed concern that a jury reasonably might understand the language of the instruction to define the determination of penalty as " 'simply a finding of facts' " or " 'a mere mechanical counting of factors on each side of the imaginary "scale." ' " (*Ibid.*) We also expressed concern that the jury reasonably might understand the instruction to require imposition of the death penalty if the factors in aggravation outweigh those in mitigation, even where that punishment does not appear appropriate in view of all the circumstances of the case. (*People v. Hamilton, supra*, 45 Cal.3d at pp. 370-371; *People v. Brown, supra*, 40 Cal.3d at pp. 540-544.) For those cases predating *Brown* (such as the present case) in which the jury was instructed in the language of section 190.3, we advised we would review each appeal on its particular merits to determine whether the jury might have been misled to the defendant's prejudice. (*People v. Hamilton, supra*, 45 Cal.3d 351, 371; *People v. Brown, supra*, 40 Cal.3d at p. 544, fn. 17.)

In the present case, with regard to the first concern expressed in *Brown, supra*, 40 Cal.3d 512, we observe that

the jury was instructed, according to defendant's request, as follows: "In considering, taking into account, and being guided by the aggravating and mitigating circumstances, you may not decide the effect of such circumstances by the simple process of counting the number of circumstances on each side. The particular weight of such opposing circumstances is not determined by the relative number, but rather by their relative convincing force on the ultimate question of punishment." Moreover, neither the prosecutor nor defense counsel suggested the jury simply should count the factors. (See *People v. Webster* (1991) 54 Cal.3d 411, 451-452; *People v. Howard* (1988) 44 Cal.3d 375, 435-436; *People v. Myers* (1987) 43 Cal.3d 250, 275.) Accordingly, we conclude the jury was not misled into mechanically counting the aggravating and mitigating factors.

With regard to the second concern described in *Brown, supra,* 40 Cal.3d 512, defendant asserts the jury was misled because, during voir dire, the prosecutor obtained assurances from the prospective jurors that they would not have difficulty in discharging their responsibility to impose the death penalty in the event the aggravating circumstances outweighed those in mitigation, and because, during closing argument, the prosecutor emphasized the language of section 190.3. After repeating the mandatory language of the statute, the prosecutor stated: "So if you conclude that the aggravating circumstances outweigh the mitigating circumstances, you are obligated to return a verdict of death. [¶] And we spent a considerable amount of time on voir dire on this issue, and you indicated that if that was the case, that would be your verdict." In concluding his argument,

the prosecutor commented that the jury had "an important, awesome responsibility," and asked them to return a death verdict "not because you want to but because under the law of California it's necessary. Thank you."

In numerous cases we have found such remarks to be harmless. For example, we have concluded that a prosecutor's argument is not misleading simply because it restates the statutory language (e.g., *People v. Hamilton* (1989) 48 Cal.3d 1142, 1181), describes the statutory language as mandatory (e.g., *People v. Adcox* (1988) 47 Cal.3d 207, 267 [prosecutor emphasized the word "shall" and advised the jury that "you haven't any choice"]; *People v. Hendricks, supra,* 44 Cal.3d 635, 653-655, 662 [Prosecutor emphasized the word "shall," describing it as a "term of command" with a compulsory meaning, and the process as an "automatic" one]; *People v. Allen* (1986) 42 Cal.3d 1222, 1279 [Prosecutor argued: " ' . . . *Shall, not may, not might, not maybe. It is very explicit*. . . . ' "]), or emphasizes that the jury's decision is dictated by the law. (E.g., *People v. Burton* (1989) 48 Cal.3d 843, 870; *People v. Grant* (1988) 45 Cal.3d 829, 857.)

Moreover, in concluding, the prosecutor emphasized that the jurors had an "important, awesome responsibility." (See *People v. Burton, supra,* 48 Cal.3d 843, 871.) This is not a case, such as *People v. Milner* (1988) 45 Cal.3d 227, in which the prosecutor "assured the jurors again and again that they did not have to 'shoulder the burden of personal responsibility,' told them again and again that the law 'protects' them from deciding what is 'just and right,' and even encouraged them to 'hide' behind the law." (*Id.*, at p. 257; see *People v. Burton, supra,* 48 Cal.3d 843, 872.) Nor did the prosecutor admonish the jury that

the law, rather than the jury, determined the issue whether the defendant should suffer life imprisonment or death. (Cf. *People v. Farmer* (1989) 47 Cal.3d 888, 928.) Furthermore, taken as a whole, the prosecutor's statements concerning the mandatory aspect of section 190.3 were a minor part of his closing argument. (See *People v. Kaurish* (1990) 52 Cal.3d 648, 715.)

The instructions given in this case also implied that the jury's decision as to penalty was not to be automatic or mechanical. The jury twice was informed it had the duty to decide which of the two possible punishments should be imposed, was advised to consider the evidence, the arguments of counsel, and the aggravating and mitigating factors "if applicable," and was told that if a factor was not found to be mitigating, that circumstance did not render it an aggravating factor unless the jury determined it to be aggravating beyond a reasonable doubt. At defendant's request, the jury was instructed that it was obligated to weigh the sympathetic elements of defendant's background against those which might offend the conscience, and in so doing, it could consider pity, sympathy, and mercy for defendant, but that it could not be governed by conjecture, prejudice, or public opinion. The jury also was instructed that defendant and the prosecution were entitled to the individual opinion of each juror.

Finally, the comments of defense counsel underscored the jury's discretion to decide which penalty was appropriate under the circumstances: counsel advised the jurors that each of them had an independent, singular responsibility to determine the punishment, that it was not a democratic or community effort, and that each

would have to live with the verdict. Defense counsel told the jurors to consider and weigh the factors, as they felt appropriate. (See *People v. Grant, supra,* 45 Cal.3d 829, 856-857; *People v. Williams* (1988) 44 Cal.3d 1127, 1149.) Moreover, defense counsel stressed that the most important factor, a factor in mitigation, was the absence of any violence in defendant's past, thereby underscoring the jurors' duty to consider the factors individually.

From the arguments both of the prosecutor and defense counsel, and from the instructions, the jurors would have understood that they were required to determine the appropriate penalty for defendant by weighing the enumerated factors. (*People v. Burton, supra,* 48 Cal.3d 843, 873.) Viewing the instructions and arguments as a whole, we are satisfied there is no reasonable likelihood that the jury was misled as to the scope of its sentencing responsibility. (*People v. Clair, supra,* 2 Cal.4th 629, 662-663.)[12]

2. Instruction on consideration of multiple special circumstances.

Defendant contends the trial court failed to give an instruction on multiple special circumstances as required

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[12] In light of this conclusion, we need not, and do not, address the continuing validity of *People v. Brown, supra,* 40 Cal.3d 512, in light of the United States Supreme Court's decisions in *Blystone v. Pennsylvania* (1990) 494 U.S. 299, 108 L.Ed.2d 255, 110 S.Ct. 1078, and *Boyde v. California* (1990) 494 U.S. 370, 108 L.Ed.2d 316, 110 S.Ct. 1190. (*People v. Webster, supra,* 54 Cal.3d 411, 452, fn. 23; *People v. Cooper, supra,* 53 Cal.3d 771; 845, fn. 15; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1231, fn. 30.)

by our decision in *People v. Harris* (1984) 36 Cal.3d 36. In *Harris*, the plurality opinion stated that in a case where "overlapping" special circumstances are found to be true, the risk arises that a jury may give undue weight to the mere number of special circumstances found true. "To avoid that risk, in those cases involving a single act or an indivisible course of conduct with one principal criminal objective, the jury should be instructed that although it found several special circumstances to be true, for purposes of determining the penalty to be imposed, the multiple special circumstances should be considered as one." (*Id.*, at p. 66, plur. opn. by Broussard, J.)

A majority of this court subsequently held to the contrary in *People v. Melton, supra*, 44 Cal.3d 713, 765-768. In *Melton* we concluded that it is constitutionally legitimate for the state to determine that a death-eligible murderer is more culpable and thus more deserving of death, if, as in the *Melton* case, he not only robbed the victim but committed burglary in order to facilitate commission of the robbery and murder, because these offenses involve violations of distinct interests, each of which is relevant to a determination of the seriousness of the crime. (*Id.*, at p. 767.) The decision in *Melton* has been applied in subsequent cases to reject similar claims based upon *Harris*. (E.g., *People v. Mickey* (1991) 54 Cal.3d 612, 691-692; *People v. Sanders* (1990) 51 Cal.3d 471, 529; *People v. Hernandez, supra*, 47 Cal.3d 315, 357-358.) Accordingly, we reject defendant's contention.

In his supplemental brief, defendant contends that *Melton* also requires that the jury receive instruction that the acts providing the bases for the special circumstances (rape and burglary) may not each be weighed more than

once in the penalty determination, that is, both under the circumstances of the crime and as special circumstances (pursuant to section 190.3, factor (a), and the instruction patterned thereon). (*People v. Melton, supra*, 44 Cal.3d 713, 768.) Although defendant urges that the trial court has a sua sponte duty to so instruct, we have indicated only that upon defendant's request, such an instruction should be given. (*People v. Ashmus* (1991) 54 Cal.3d 932, 997; *People v. Morris* (1991) 53 Cal.3d 152, 224; *People v. Melton, supra*, 44 Cal.3d 713, 768.)

Moreover, we have observed that in the absence of any misleading argument by the prosecutor or an event demonstrating the substantial likelihood of "double-counting," reversal is not required. (*People v. Morris, supra*, 53 Cal.3d 152, 224; *People v. Melton, supra*, 44 Cal.3d 713, 768-769.) In the present case, the prosecutor did not suggest the offenses other than murder be considered dually as special circumstances and as acts making the murder more heinous; he simply underscored the facts showing the brutality of the acts.

C. Constitutionality of section 190.3 factor (a).

Defendant challenges the constitutionality of the portion of section 190.3 that provides: "In determining the penalty, the trier of fact shall take into account . . . [as] relevant: [¶] (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance found to be

true. . . . " Defendant contends the phrase, "the circumstances of the crime," is too vague to permit any meaningful distinction between those murders that warrant the death penalty and those that do not.

The United States Supreme Court itself has established that the circumstances surrounding a capital offense constitute one of the criteria upon which the jury *should* base its penalty determination. (See, e.g., *Penry v. Lynaugh* (1989) 492 U.S. 302, 318, 106 L.Ed.2d 256, 109 S.Ct. 2934; *Booth v. Maryland* (1987) 482 U.S. 496, 502, 96 L.Ed.2d 440, 107 S.Ct. 2529, overruled on other grounds in *Payne v. Tennessee* (1991) ___ U.S. ___, 115 L.Ed.2d 720, 111 S.Ct. 2597; *Jurek v. Texas* (1976) 428 U.S. 262, 304, 49 L.Ed.2d 944, 96 S.Ct. 2950 (plur. opn.). The high court has not stated or implied that the factor of the "circumstances of the offense" is unconstitutionally vague.

Defendant also contends section 190.3 is unconstitutional as applied to him because, unlike the typical case where the same jury decides both issues of guilt and penalty, his case afforded the jurors only one opportunity to express their outrage at the offenses – by assigning the degree of punishment – and therefore the jury was more prone to set the maximum penalty. Nothing in the evidence, the arguments of counsel, or the instructions supports this assertion. Furthermore, because it was defendant who requested the change of venue and, by definition, the new jury, he is not in a position to claim prejudice from the granting of his motion. We also note that defendant has provided no authority for the proposition that, when a new penalty jury has been impaneled, the state may not permit the jury to determine the appropriate punishment on the basis of the same criteria that

would have applied had a single jury determined both issues of guilt and penalty. Defendant has not provided any basis for us to conclude section 190.3 is unconstitutional.

D. Denial of the automatic application for modification of the verdict.

Defendant contends the court erred in denying the automatic motion to modify the verdict pursuant to section 190.4, subdivision (e). Under that section, the trial judge's "function is not to make an independent and de novo penalty determination, but rather to independently reweigh the evidence of aggravating and mitigating circumstances and then to determine whether, in the judge's independent judgment, *the weight of the evidence supports the jury's verdict.* [Citations.]" (*People v. Lang* (1989) 49 Cal.3d 991, 1045, italics in original; *People v. Edwards, supra,* 54 Cal.3d 787, 846.) The trial judge must set forth his or her reasons with sufficient particularity to allow effective appellate review. (54 Cal.3d at p. 846; *People v. Kelly* (1990) 51 Cal.3d 931, 970.)

1. The circumstances of the crime.

Relying upon *People v. Rodriguez, supra,* 42 Cal.3d 730, defendant contends the trial court did not adequately specify its reasons for determining that section 190.3, factor (a) (the circumstances of the crime), amounted to an aggravating factor. In that case, we held the court's statement of reasons for denying the motion, as a whole, was insufficient "to assure thoughtful and effective

appellate review," where the trial court simply stated that, having considered the arguments of counsel, all the evidence, and all the aggravating and mitigating circumstances, the aggravating factors outweighed those in mitigation and the weight of the evidence supported the jury's verdict of death. (At pp. 792-794.)

In the present case, the trial court's comments, in considering the section 190.3 factors generally and factor (a) in particular, were far more extensive and detailed. In explaining its ruling denying the automatic motion, the court commented that it had reviewed the evidence, considered the aggravating and mitigating factors, and made a determination whether the jury's verdict (that the aggravating circumstances outweighed the mitigating circumstances) was contrary to law or to the evidence. Following defense counsel's argument that the offenses committed in the present case were not sufficiently grievous to justify the death penalty, the court stated it had examined and carefully reviewed the testimony presented and had found that the jury's verdict was supported by the weight of the evidence and that defendant was guilty beyond a reasonable doubt.

The court then considered each section 190.3 factor in turn, devoting the greatest amount of time to factor (a), the circumstances of the crime. The court summarized the evidence, emphasizing that the telephone lines in the kitchen and the den had been cut, and that the victim had been raped, beaten, stabbed, and intentionally tortured by defendant. The court described in detail the condition of the body and recounted the expert testimony concerning the nature of the victim's injuries and defendant's purpose in inflicting them. The court also noted that

defendant had transported the victim's body to another location.

The trial court's discourse on section 190.3, factor (a), was sufficiently detailed and thorough to justify the determination made by the court. It is readily apparent the court provided far more elaboration than did the trial court in *Rodriguez, supra,* 42 Cal.3d 730, and defendant does not indicate what additional elements he believes the court should have considered in deciding whether the circumstances of the capital offense constituted a factor in aggravation. We conclude the court adequately stated its reasons for determining that the circumstances of the crime constituted an aggravating factor.

2. Defendant's role in the crime.

Section 190.3, factor (j), specifies that among the matters to be considered by the trier of fact in determining the penalty is "[w]hether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor." Defendant contends that, because the evidence merely established the inapplicability of factor (j), it was improper for the trial court to consider, as a factor in aggravation, the circumstance that defendant acted alone.

We have indicated or implied in numerous prior decisions that factor (j) may be considered only as a mitigating factor, and that where the defendant is not an accomplice whose participation in the offense is relatively minor, the factor is simply inapplicable and should not be considered as aggravating. (*People v. Daniels, supra,* 52

Cal.3d 815, 889; *People v. Gallego, supra,* 52 Cal.3d 115, 200; *People v. Gonzalez, supra,* 51 Cal.3d 1179, 1233-1234; *People v. Hamilton, supra,* 48 Cal.3d 1142, 1184; *People v. Burton, supra,* 48 Cal.3d 843, 865; *People v. Walker* (1988) 47 Cal.3d 605, 643-644; *People v. Hernandez, supra,* 47 Cal.3d 315, 363-364; *People v. Adcox, supra,* 47 Cal.3d 207, 273; *People v. Moore* (1988) 47 Cal.3d 63, 92 & fn. 13; *People v. Karis* (1988) 46 Cal.3d 612, 652; *People v. Brown, supra,* 46 Cal.3d 432, 455-456 & fn. 10; *People v. Siripongs* (1988) 45 Cal.3d 548, 582-583; see *People v. Davenport, supra,* 41 Cal.3d 247, 288-290.) Nonetheless, in *People v. Howard, supra,* 1 Cal.4th 1132, 1195, we approved the trial court's treatment of evidence of that defendant's sole participation as aggravating under factor (j). We need not decide the issue raised by the apparent conflict among these decisions, because any error in the present case would not have been prejudicial.

The People indicate that the failing, if any, in the trial court's consideration (under section 190.3, factor (j)) of the evidence that defendant had acted alone, consists in the court's already having considered defendant's singular and active role in the offense when the court reviewed the circumstances of the offense under section 190.3, factor (a). In his reply brief, defendant contends that the trial court did, in fact, err in this regard.

Our review of the record reveals, however, that at no time during the court's discourse on the circumstances of the offense did it emphasize, or even mention, that defendant had acted alone. That the court reviewed defendant's *commission* of the offense (and the nature of that offense) does not lead to the conclusion that the court considered defendant's exclusive participation in the acts

as a circumstance in aggravation under section 190.3, factor (a). Aside from the court's consideration, under section 190.3, factor (j), of defendant's role in the offense, the only other reference by the court to the circumstance that defendant acted alone was made in the context of its review of section 190.3, factor (g), addressing whether defendant had acted under extreme duress or under the domination of another person. In the latter part of its review, the court simply noted that, because defendant had acted alone, factor (g) was inapplicable. The court did not consider twice the evidence that defendant had acted alone in conceiving and carrying out the offense, and therefore, any error in considering this circumstance under factor (j) was harmless. (*People v. Burton, supra,* 48 Cal.3d 843, 865; *People v. Adcox, supra,* 47 Cal.3d 207, 273.)

3. Defendant's age and prior felony convictions.

Defendant next asserts the trial court erred in determining that, although defendant's age (twenty years, three and one-half months at the time of the offense) "could be a mitigating factor," the circumstances that defendant had been convicted of three prior felonies, had violated probation in March 1981, and was on parole at the time he committed the present offense, rendered defendant's age neither a mitigating nor an aggravating factor.

Depending upon the circumstances of the crime, age properly can be considered either as a mitigating or an aggravating factor. (*People v. Mitcham, supra,* 1 Cal.4th 1027, 1076; *People v. Edwards, supra,* 54 Cal.3d 787, 844.) It

functions " 'as a metonym for any age-related matter suggested by the evidence or by common experience or morality that might reasonably inform the choice of penalty.' " (*People v. Mitcham, supra,* 1 Cal.4th 1027, 1076.)

Therefore, in the present case the trial court was not obligated to treat defendant's age as a factor in mitigation. Moreover, we believe that although the court expressed itself somewhat imprecisely, in essence it weighed the two factors of defendant's age and his prior felony convictions in concluding, in light of defendant's prior record, that the circumstance that he was between 20 and 21 years of age at the time he committed the present offense was not entitled to much weight. The court properly weighed these factors in assessing whether the penalty was appropriate. (See, e.g., *People v. Hamilton, supra,* 48 Cal.3d at pp. 1186-1187.)[13]

4. Consideration of other extenuating circumstances.

Defendant contends that the court inadequately stated its reasons for concluding no mitigating circumstances were present under section 190.3, factor (k),[14] and

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[13] Because the trial court did not consider any "invalid aggravating factor" (including any aggravating factor not supported by substantial evidence) in denying the motion under section 190.4, subdivision (e), *Sochor v. Florida* (1992) ___ U.S. ___, ___ [119 L.Ed.2d 326, 112 S.Ct. 2114, 2120-2123], cited in defendant's supplemental brief, has no application to the present case.

[14] The court stated: "[T]he final factor is, quote, any other circumstances which extenuate the gravity of the crime, even

that the court's statement did not indicate it had assessed the credibility of the witnesses, determined the probative force of the testimony, and weighed the evidence.

As described above, the court reiterated that it had evaluated all the evidence and expressly considered the evidence or absence of evidence relating to each successive factor, examining carefully the evidence in mitigation. After expressing its views as to the applicability of section 190.3, factor (k), the court stated: "As required by law, the Court has considered all the evidence adduced at the penalty phase of the trial and has been guided by the aforesaid factors, and having heard and considered the arguments of counsel, the Court concludes and finds that the aggravating circumstances do in fact outweigh the mitigating circumstances and therefore the jury's finding is supported by the evidence." The court stated that, in its independent review of all the evidence, it found the jury's verdict was not contrary to the law or the evidence.

The trial court's comments make clear that it fully understood its obligation to assess the credibility of the witnesses, determine the probative force of the testimony, and weigh the evidence, including all information pertaining to defendant and applicable under section 190.3, factor (k). We conclude the statement of reasons given by

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though it is not a legal excuse for the crime, including but not limited to the defendant's character, background, history, mental condition and physical condition, end quote. [¶] The evidence adduced at the penalty phase of the trial causes the court to find that there are no circumstances which extenuate the gravity of the crimes which you committed and for which you have been convicted. Therefore, the Court finds that this factor constitutes neither a mitigating nor an aggravating factor."

the trial court for its determination pursuant to factor (k) was adequate.

We also reject the contention, raised in defendant's reply brief, that the court, in referring to its finding that the jury's verdict was not contrary to the law or the evidence, demonstrated that it misconstrued its task in reviewing the evidence independently under section 190.4. The statements made by the court reveal that it accurately perceived its duty to reweigh independently the evidence of aggravating and mitigating circumstances and then determine whether, in its independent judgment, the weight of the evidence supported the jury's verdict. (§ 190.4, subd. (e); *People v. Edwards, supra,* 54 Cal.3d 787, 846; *People v. Lang, supra,* 49 Cal.3d 991, 1045.) In view of the numerous instances in which the trial court reiterated that it independently had reviewed the evidence, and the particularity with which the court reviewed the evidence, we conclude the court properly understood and performed the obligation imposed upon it by section 190.4, subdivision (e).

III. CONCLUSION

The judgment is affirmed in its entirety.

GEORGE, J.

WE CONCUR:

LUCAS, C.J.
PANELLI, J.
ARABIAN, J.
BAXTER, J.

CONCURRING AND DISSENTING OPINION BY KENNARD. J.

I concur in the judgment. I write separately to emphasize that the authority of trial courts to comment on the evidence is subject to strict limitations and must be exercised with extreme caution, and to express my view that, consistent with this court's well-established case law, factor (j) of Penal Code section 190.3 cannot be an aggravating circumstance.

I.

Our Constitution (Cal. Const., art. VI, § 10), as well as our statutes (Pen. Code, §§ 1093, subd. (f), 1127), grant trial courts the authority to comment on the testimony and credibility of witnesses. But there is a countervailing consideration. The Constitutions of both the United States (U.S. Const., Amend. VI) and the State of California (Cal. Const., art. I, § 16) also grant a criminal defendant the right to a jury trial, and that right requires that the jury be the exclusive arbiter of questions of fact and the credibility of witnesses. (See e.g., *People v. Rodriguez* (1986) 42 Cal.3d 730, 766; *People v. Friend* (1958) 50 Cal.2d 570, 577-578; *People v. Ottey* (1936) 5 Cal.2d 714, 728.)

There is an inherent tension between the authority of a trial court to comment on the evidence and the right of a criminal defendant to a jury trial. A court's exercise of its authority to comment on the evidence always poses the danger of a violation of the right to jury trial. Because a judge presiding over a trial necessarily has substantial influence on the jury (*Bollenbach v. United States* (1946) 326 U.S. 607, 612), every judicial comment on the evidence

carries with it an appreciable risk that the jury may discount its own view of the evidence in deference to the judge's opinion. (*People v. Cook* (1983) 33 Cal.3d 400, 407.) Therefore, in the interest of protecting the right to jury trial while giving efficacy to our state Constitution's grant of authority to comment on the evidence, appellate courts have imposed strict limitations on the trial court's authority to comment.

Thus, a trial court's comments on the evidence must be "necessary for a proper determination of the cause." (Cal. Const., art. VI, § 10.) They must assist, not coerce, the jury. (*People v. Rodriguez, supra,* 42 Cal.3d at pp. 767-768.) The court must inform the jurors that they are the exclusive judges of all questions of fact and of the credibility of witnesses. (Pen. Code, § 1127; *People v. Brock* (1967) 66 Cal.2d 645, 651.) The comments must be made with a view to protecting the rights of the defendant. (*People v. Brock, supra,* 66 Cal.2d at p. 650.) They must be accurate, temperate, scrupulously fair, and made with wisdom and restraint. (*People v. Cook, supra,* 33 Cal.3d at p. 408.) The comments may not (1) be argumentative (*Ibid.*); (2) distort the law or the record (*People v. Brock, supra,* 66 Cal.2d at p. 650; *People v. Friend, supra,* 50 Cal.2d at p. 577); (3) withdraw evidence from the jury's consideration (*People v. Brock, supra,* at p. 650); (4) expressly or impliedly direct a verdict (*People v. Cook, supra,* 33 Cal.3d at p. 408; *People v. Brock, supra,* 66 Cal.2d at p. 650); or (5) express a view on the ultimate issue of guilt or innocence (*People v. Melton* (1988) 44 Cal.3d 713, 735).

In this case, the trial court's comments came perilously close, but did not cross, the line between permissible jury assistance and prohibited coercion. The court

made its remarks without notice to counsel and after it was aware that the jury had deadlocked 11 to 1. The comments, however, were accurate and did not distort the record. Immediately before and after the comments, the court reminded the jury that it was the exclusive arbiter of questions of fact and the credibility of the witnesses, and that it was free to disregard any or all of the trial court's comments. The jury then continued its deliberations for approximately four hours. (Compare *People v. Cook, supra,* 33 Cal.3d at p. 406 [jury returned verdict fourteen minutes after trial court's comments].)

On balance, giving consideration to all of the circumstances in which the trial court's comments were made (*People v. Melton, supra,* 44 Cal.3d at p. 735) in the context of the existing state of the law (see *People v. Rodriguez supra,* 42 Cal.3d at pp. 765-770), I agree with the majority's conclusion that the trial court's comments were within the scope of its authority under article VI, section 10 of the state Constitution. I emphasize, however, that a trial court's option to comment on the evidence should be exercised, if at all, only with great caution.

II.

As a result of numerous decisions of this court in recent years, it is now well-established that the circumstance described in factor (j) of Penal Code section 190.3 (hereafter factor (j)) can only be mitigating. Yet the majority now treats this issue as unresolved (see maj. opn., *ante,* pp. ___-___ [typed maj. opn. at pp. 73-74]), even

though it was resolved years ago. In so doing, the majority injects a harmful and entirely needless uncertainty into the center of our death penalty law.

Factor (j) directs the jury in the penalty phase of a capital case to consider "[w]hether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor" in deciding whether to impose the death penalty. Thus, if the defendant is an accomplice whose role in the offense was relatively minor, the jurors must consider this fact as a circumstance in mitigation, although they are free to give it whatever weight they deem appropriate. If these conditions are not satisfied, factor (j) is inapplicable, as the defendant's conduct in this regard is not "*more* serious than 'normal' " for a person who has been convicted of murder with special circumstances. (*People v. Daniels* (1991) 52 Cal.3d 815, 889; *People v. Burton* (1989) 48 Cal.3d 843, 864-865; *People v. Adcox* (1988) 47 Cal.3d 207, 273; *People v. Siripongs* (1988) 45 Cal.3d 548, 583; see also *People v. Davenport* (1985) 41 Cal.3d 247, 289-290.)

When, as here, the defendant is the sole perpetrator of the murder, factor (j) does not apply, as this court has held on numerous occasions. *People v. Daniels, supra,* 52 Cal.3d at p. 889; *People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Hernandez* (1988) 47 Cal.3d 315, 364; *People v. Karis* (1988) 46 Cal.3d 612, 652; *People v. Brown* (1988) 46 Cal.3d 432, 455-456 & fn. 10; *People v. Siripongs, supra,* 45 Cal.3d at p. 583; see also *People v. Gallego* (1990) 52 Cal.3d 115, 200; *People v. Gonzales* (1990) 51 Cal.3d 1179, 1233-1234; *People v. Burton, supra,* 48 Cal.3d at pp. 864-865; *People v. Adcox, supra,* 47 Cal.3d at p. 273; *People v. Walker* (1988) 47 Cal.3d 605, 643-644; *People v. Moore* (1988) 47

Cal.3d 63, 92 & fn. 13.) The majority puts in doubt the continuing validity of all these cases by asserting that they are now in "apparent conflict" with *People v. Howard* (1992) 1 Cal.4th 1132, 1195. But the opinion in *Howard* provided no reasoning or analysis to support the one sentence in that opinion that is arguably inconsistent with this otherwise unbroken line of authority, nor did it discuss or even acknowledge any of the contrary decisions listed above. The suggestion in Howard that factor (j) can be aggravating carries no persuasive force and should therefore be disapproved.

In *People v. Hernandez, supra,* 47 Cal.3d 315, 364, this court said that because the defendant in that case was the sole perpetrator of the murders, factor (j) "obviously did not apply. . . . " What was obvious to a unanimous court in *Hernandez* has become obscure to the current majority, and for no good reason. The mandate of this court is to settle important questions of law (Cal. Rules of Court, rule 29(a)), not to unsettle them. I decline to join the majority in unsettling the proper meaning and scope of factor (j).

KENNARD, J.

DISSENTING OPINION BY MOSK, J.

I dissent.

In my view, the court committed reversible error by commenting as it did on the evidence and defendant's credibility.

I

Trial on the question of guilt or innocence was conducted in late 1982 in rural Shasta County. It was charged that, on April 21 or 22 of that year, defendant burglarized the residence of Bonita Bergh Stendal in the small mountain community of Burney and there proceeded to rape and murder the woman; it was alleged that he intentionally inflicted great bodily injury on Stendal in the course of the burglary and the rape, and that he murdered her under the special circumstances of felony-murder-burglary, felony-murder-rape, and torture murder.

Between December 8 and 14, the People presented evidence to establish defendant's guilt. Included were three palm prints at Stendal's residence: a bloody and visible print from defendant's right hand, and two dry and latent prints, one from his right hand, the other from his left. Also offered were various extrajudicial statements he had made relating to his activities and whereabouts on April 21 and 22.

On December 14, defendant presented evidence. He took the stand to deny involvement in the crimes and to attempt to explain his palm prints and extrajudicial statements. He sought to exculpate himself and to inculpate his friend Robert Manley.

On December 15, the prosecutor and defense counsel delivered their summations. The prosecutor's position was, of course, that defendant was guilty. He argued, in part, as follows: Stendal had been murdered; someone was obviously responsible; that someone was defendant; his palm prints placed him in the Stendal residence; true, he gave exculpatory testimony about his activities and whereabouts on April 21 and 22, within the house and without; his statements on the stand, however, did not explain the palm prints and were inconsistent with his statements out of court, which in turn were inconsistent with each other; as a result, his exculpatory testimony lacked credibility. Defense counsel's position was to the contrary. His argument included an attempt to counter practically all the prosecutor's points.

Also on December 15, the jury was instructed on the murder, rape, and burglary charges and the special circumstance and great-bodily-injury allegations. The panel then commenced its deliberations and spent less than an hour at the task. The court recessed the proceedings for the day.

On December 16, at morning's opening, the court effectively instructed the jury to begin its deliberations anew after it substituted an alternate juror in place of one of the original members, whom as it stated it had discharged on stipulation because of a sudden illness. The panel deliberated about four and one-quarter hours. The foreman then reported to the court that the jurors were at an impasse and requested direction on how to proceed. The court asked whether the panel had voted on murder. The foreman said yes. The court asked for the numerical count without disclosure of the position as to guilt or

innocence. The foreman said 11 to 1. The court asked whether the panel had voted on rape. The foreman said no. The court posed the same question about burglary. The foreman gave the same answer. The court then informed the jurors that they faced a situation that was not unusual, and might need more time to make their determinations. It recessed the proceedings for the day.

On December 17, the jury deliberated about two and one-half or three and one-half hours. At the foreman's request, the court reread the instructions to the panel. The jury deliberated about one and one-half hours more.

Late that afternoon, the foreman sent the court a note that Juror Mae Lois Turner – who was evidently the only Black person on the panel – "would like to disqualify self. Would like to be replaced by alternate."

In open court, in the presence of the other members of the panel, Juror Turner confirmed the report. The court asked, "Why is it you wish to disqualify yourself?" She answered, "Because I'm the one," "I'm the one who is – there is eleven to one. I'm the one." The court stated, "That would not be – that's not justification for disqualification. If you have some problem – " She interjected, "I don't have any problem, Judge," and explained, "I have my opinion and I don't want to be – I don't want to be pressured into doing something, and they have their opinion, and I have mine." The court responded, "Well, that's fine. There is no problem with that, so long as you're discussing the evidence." One of the jurors remarked, "Everybody is getting tired with one another."

Addressing all the jurors, the court stated that the case was complicated and relatively little time had been spent in deliberations. It reread the instruction that both the People and defendant were entitled to the individual

opinion of each juror. It also reminded the jurors that they were under a duty to proceed conscientiously, and expressed its belief that they were doing so. It then noted the lateness of the hour. It determined that the panel had not voted on any of the charges or allegations other than murder. It recessed the proceedings until December 20.

On December 20, without notice to the People or defendant and before deliberations resumed, the court made a comment to the jurors and alternate jurors concerning the evidence and defendant's credibility. It opened with a statement that its words were intended to be "advisory only" and were "not binding." It then proceeded: there was no question that the killing of Stendal was murder; rather, the basic question was whether defendant was the murderer; his palm prints placed him in the Stendal residence; true, he gave exculpatory testimony about his activities and whereabouts on April 21 and 22, within the house and without; his statements on the stand, however, did not explain the palm prints and were inconsistent with his statements out of court, which in turn were inconsistent with each other; as a result, his exculpatory testimony lacked credibility. It closed by repeating its statement that its words were intended to be "advisory only" and were "not binding."[1] The jury then

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[1] "Ladies and gentlemen of the jury and the alternates, for the purpose of assisting you in deciding this case, I am permitted by the [C]onstitution of California to comment on the issues, the evidence and the testimony and credibility of any witness. And it occurred to me that before you retired to continue your deliberations this morning that some comment along those lines might be of some assistance to you.

"Now, you should keep in mind that my comments are intended to be advisory only, and are not binding on you, as you

deliberated about three and one-half or four and one-half

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are the exclusive judges of the questions of fact submitted to you and of the credibility of the witnesses. You should disregard any or all of the comments, if you do not agree, if they do not agree with your views of the evidence and the credibility of the witnesses.

"Now, under California law, by definition, the word 'homicide' means the killing of one human being by another, either lawfully or unlawfully. Now, under the instructions that I've given you, the word homicide includes murder. And I've given you in that connection instructions on first degree murder as well as instructions on second degree murder. There is the word homicide, however, also means the lawful killing of another – of a person by another. And that's in situations where the act occurs as a result of some excusable or justifiable – under the law – reason for killing. In this particular case, we do not have a justifiable or lawful killing of a human being by another. There shouldn't be any doubt in anyone's mind that the death, the killing of Bonita Bergh Stendal was an unlawful killing of her by another person. There is absolutely no evidence whatsoever that she was killed in self defense or any other type of reason or that she killed herself. There shouldn't be any doubt in anyone's mind on the facts that have been presented in this case, that we have an unlawful killing of Ms. Stendal by another person.

"Now, the real question in this case is whether the State, the district attorney, has proved beyond a reasonable doubt that the defendant is legally responsible for the killing. That's basically the issue here, as well as if the State has proved beyond a reasonable doubt that the defendant is legally responsible for the killing, have they proved beyond a reasonable doubt that it's murder in the first degree or murder in the second degree. And if they've proved beyond a reasonable doubt that it's murder in the first degree, you go on to whether they proved beyond a reasonable doubt any one or more of the special circumstances that have been mentioned. And you are also called upon to determine as to whether they've proved beyond a reasonable doubt that the defendant committed the rape, whether they

hours. It returned guilty verdicts on each of the charges and true findings on each of the allegations.

II

Article VI, section 10 of the California Constitution (hereafter article VI, section 10) declares in relevant part that "The court may make such comment on the evidence and the testimony and credibility of any witness as in its

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proved beyond a reasonable doubt the defendant committed a burglary.

"Now, in that connection, there have been several statements attributed to the defendant out of court concerning his whereabouts and activities on the night of April the 21st and the early morning hours of April the 22nd. These statements attributed to him are inconsistent with one another and are also inconsistent with his testimony here in court concerning his activities that evening and in the early morning hours of April the 22nd.

"Now, the district attorney has placed him in the house of Bonita Bergh Stendal through three palm prints; one bloody right palm print . . . was created by blood being on the palm first and then transferred. . . . In addition to that, . . . there were two dry palm prints. By that, they were latent, there was a left palm print, which was latent. . . . And another dry palm print of the right palm. . . .

"Now, the defendant has testified and given you an explanation as to what he did in that house that morning which explains the presence of the bloody palm print, but does not explain the presence of the two dry or latent palm prints. Under those circumstances, I have difficulty in believing the testimony of the defendant. Now, again, my comments are intended to be advisory only and are not binding on you as you are the exclusive judges of the questions of fact submitted to you and of the credibility of the witnesses. You should disregard any or all of the comments that I've made if they do not agree with your views of the evidence and the credibility of the witnesses."

opinion is necessary for the proper determination of the cause."

The purpose of the provision is to allow the trial judge to use his "training in analyzing testimony" and "experience in determining the credibility of witnesses" "to assist the jurors in determining what evidence has a bearing on the disputed issues in the case and to aid them in weighing the evidence. . . . " (*People v. Brock*, (1967) 66 Cal.2d 645, 650, "overruled" on a point not implicated herein, *People v. Cook* (1983) 33 Cal.3d 400, 413, fn. 13, overruled in turn on a point not implicated herein, *People v. Rodriguez* (1986) 42 Cal.3d 730, 770.)

The provision, of course, is subject to the criminal defendant's right to trial by jury under both the United States and California Constitutions. The Sixth Amendment to the federal charter, as made applicable to the states by the due process clause of the Fourteenth Amendment, declares that "In all criminal prosecutions, the accused shall enjoy the right to a . . . trial[ ] by an impartial jury. . . . " Article I, section 16 of the state charter provides that "Trial by jury is an inviolate right and shall be secured to all. . . . "

Under article VI, section 10, a court has broad power in delivering a comment. (E.g., *People v. Rodriguez, supra*, 42 Cal.3d at p. 766.) But that power is not unlimited. (E.g., *People v. Brock, supra*, 66 Cal.2d at p. 650.) As noted, the constitutional authority has been given to *judges* for the purpose of assisting *jurors*. A judge must, of course, cleave fast to the judicial role and not adopt that of an advocate. (See, e.g., *People v. Friend* (1958) 50 Cal.2d 570, 577 [construing former § 19 of art. VI of Cal. Const.,

which was the predecessor of present § 10 of art. VI of Cal. Const., and was virtually identical in relevant part thereto], "overruled" on a point not implicated herein, *People v. Cook, supra*, 33 Cal.3d at p. 413, fn. 13.) Also, any remarks he may make must further, and not frustrate, the defendant's "right to independent jury determination of the facts bearing on his guilt or innocence." (*People v. Rodriguez, supra*, at p. 766.) Accordingly, he may not state or suggest his own views on guilt or innocence. (*People v. Cook, supra*, at pp. 412-413; see *People v. Rodriguez, supra*, at p. 770.) To do so would "necessarily interfere[ ] with the jurors' ability to freely perform their fact-finding responsibility." (*People v. Cook, supra*, at p. 413.)

Not only is the court's power to comment broad, it is also "most potent." (*People v. Robinson* (1946) 73 Cal.App.2d 233, 237 [construing former § 19 of art. VI of Cal. Const.].) " 'The influence of the trial judge on the jury is necessarily and properly of great weight,' [citation], and jurors are ever watchful of the words that fall from him." (*Bollenbach v. United States* (1946) 326 U.S. 607, 612.) "The point need not be labored that the members of the jury are apt to give great weight to any hint from the judge as to his opinion on the weight of the evidence or the credibility of the witnesses. . . . " (*People v. Robinson, supra*, at p. 237.) Accordingly, the court must exercise its power "with great care" (*People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 886) and "with wisdom and restraint" (*People v. Shannon* (1968) 260 Cal.App.2d 320, 331), "lest [it invade] the province of the jury as trier of fact" (*People v. Rincon-Pineda, supra*, at p. 886) or indeed "control the verdicts" (*People v. Brock, supra*, 66 Cal.2d at p. 650).

It follows that, even if it proceeds ever so cautiously, a court passes beyond the bounds of what is permitted under article VI, section 10 when its comment "hinders rather than helps the jury to perform its duty in properly considering the case." (*People v. Oliver* (1975) 46 Cal.App.3d 747, 753.) Such a situation is present, for example, where the remark "provides for the jury a means to avoid the preliminary determinations called for by the instructions on the law and instead to rely on the words of the judge in returning a conviction." (*People v. Brock, supra,* 66 Cal.2d at p. 651.) A court also exceeds the permissible by making what is "tantamount to an argument to convict" (*People v. Flores* (1971) 17 Cal.App.3d 579, 588) and – a fortiori – by stating or suggesting its own views on guilt or innocence (*People v. Cook, supra,* 33 Cal.3d at pp. 412-413).

III

Applying the foregoing principles to the facts of record, I conclude that the court committed reversible error by commenting as it did on the evidence and defendant's credibility.

Error is manifest.

To begin with, the court did not proceed "with great care" (*People v. Rincon-Pineda, supra,* 14 Cal.3d at p. 886) or "with wisdom and restraint" (*People v. Shannon, supra,* 260 Cal.App.2d at p. 331). Indeed, its intervention was altogether precipitous. Almost three full days had passed since the jury had last deliberated. Comment was premature before the jurors had returned to their task and

expressed some difficulty. It was also imprudent without notice to the People and defendant.

More troubling, the court's comment was "tantamount to an argument to convict" (*People v. Flores, supra,* 17 Cal.App.3d at p. 588) and indeed suggested that the court itself believed defendant was guilty, and could only have "hinder[ed] rather than help[ed] the jury to perform its duty in properly considering the case" (*People v. Oliver, supra,* 46 Cal.App.3d at p. 753).

Recall that part of the prosecutor's summation and the substance of the court's comment were to the same effect: Stendal had been murdered; defendant's palm prints placed him in her residence; true, he gave exculpatory testimony about his activities and whereabouts on April 21 and 22, within the house and without; his statements on the stand, however, did not explain the palm prints and were inconsistent with his statements out of court, which in turn were inconsistent with each other; as a result, his exculpatory testimony lacked credibility.

It is plain that the jury would have heard the court's comment as tantamount to an argument for conviction. How could it not? The substance of the comment was the same as part of the prosecutor's summation: it added nothing and it subtracted nothing. The prosecutor's summation was, literally, an argument for conviction. The court's comment effectively approved and adopted what was urged therein. From all that appears on the face of record, the court did not deliver the words in the passionate manner evidently employed by the prosecutor. But it delivered them nonetheless.

It is also plain that the jury would have heard the court's comment to suggest that the court itself believed defendant was guilty. Again, how could it not? Innocence depended on the credibility of defendant's exculpatory testimony. The court expressed its own view on the question in no uncertain terms: " . . . I have difficulty in believing the testimony of the defendant."

It follows that the court's comment could only have hindered the jury in the proper consideration of the case. The remark allowed the panel "to rely on the words of the judge in returning a conviction" and so "avoid the preliminary determinations called for by the instructions on the law" (*People v. Brock, supra,* 66 Cal.2d at p. 651) – determinations it clearly found difficult.

To be sure, the court told the jurors that its comment was intended to be "advisory only" and was "not binding." Such an incidental statement, however, is "insufficient to neutralize" the improper remark's "potent effect." (*People v. Cook, supra,* 33 Cal.3d at p. 410, fn. 9.)

The majority's discussion is generally unobjectionable so far as it goes. But it simply does not go far enough. It fails to discern that the court's comment was tantamount to an argument for conviction and, as such, could only have hindered the jury in the proper consideration of the case. That the trial judge's words were not identical to those in other cases is obvious – and unimportant.

I now turn from the fact of error to its consequences. "Particularly in a criminal trial," such as this, "the judge's last word is apt to be the decisive word." (*Bollenbach v.*

United States, supra, 326 U.S. at p. 612.) The court's erroneous comment was its final remark. Evidently, it was dispositive. About four hours thereafter, the jury returned guilty verdicts on *all* the charges and true findings on *all* the allegations – even though it had been unable to agree on *any* verdict or finding in the approximately nine hours that preceded. Accordingly, I am "of the opinion that the error . . . has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13.)[2]

IV

In passing, I make the following observations.

First, contrary to the majority's implication, I believe that a challenge, based on *Stringer v. Black* (1992) 503 U.S. ___ [112 S.Ct. 1130] (*Stringer*), to the standard jury instruction on the determination of penalty would surely prove substantial.

In *Stringer,* the United States Supreme Court held that "if a State uses aggravating factors in deciding who shall be eligible for the death penalty or who shall receive the death penalty, it cannot use factors which as a practical matter fail to guide the sentencer's discretion" in contravention of the Eighth Amendment. (503 U.S. at p. ___ [112 S.Ct. at p. 1139].) It explained: "Although our precedents do not require the use of aggravating factors,

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[2] Because of the result I reach, I need not and do not consider whether the court's erroneous comment effectively denied defendant his right to trial by jury under either the Sixth Amendment to the United States Constitution or article I, section 16 of the California Constitution or both.

they have not permitted a State in which aggravating factors are decisive to use factors of vague or imprecise content. A vague aggravating factor employed for the purpose of determining whether a defendant is eligible for the death penalty fails to channel the sentencer's discretion. A vague aggravating factor used in the weighing process is in a sense worse, for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance." (*Id.* at p. ___ [112 S.Ct. at p. 1139].) Of course, California uses "aggravating factors" – labeled "special circumstances" (Pen. Code, § 190.2, subd. (a)) – to determine death eligibility. It also uses "aggravating factors" – bearing that very label (*id.*, § 190.3) – to decide between life and death.

A narrow *Stringer* challenge could specifically attack any one or more of the factors set out in the standard jury instruction on the determination of penalty as vague and, for that reason, likely to invite an arbitrary and capricious choice of punishment in violation of the Eighth Amendment. Defendant raises such a claim against factor (a), which covers "[t]he circumstances of the crime." The majority dismiss the point. I am dubious. That "[t]he United States Supreme Court itself has established that the circumstances surrounding a capital offense constitute one of the criteria upon which the jury *should* base its penalty determination" (maj. opn., *ante*, at p.___ [typed maj. opn. at p. 69], italics in original) is of no consequence. What is dispositive is not what jurists on appellate courts may announce, but what lay persons on juries may understand.

A broader *Stringer* challenge could generally attack the standard jury instruction on the determination of penalty as vague at its very core and, for that reason, highly likely to invite an arbitrary and capricious choice of punishment in violation of the Eighth Amendment. Certainly, the instruction raises more questions than it answers. For example, on what does the determination of penalty turn? What do the terms "aggravation" and "mitigation" mean? Which of the factors are potentially aggravating and/or mitigating? (See *People v. Bacigalupo* (1991) 1 Cal.4th 103, 152-154 (conc. opn. of Mosk, J.), vacated and remanded *sub nom. Bacigalupo v. California* (1992) ___ U.S. ___ [113 S.Ct. 32], for further consideration in light of *Stringer v. Black, supra*, 503 U.S. ___ [112 S.Ct. 1130].)

Second, factor (j) – "[w]hether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor" – is potentially mitigating and not potentially aggravating. " '[A]ggravation' means that which increases the defendant's personal moral culpability above the level of blameworthiness that inheres in the capital offense. By contrast, 'mitigation' means that which reduces his culpability below that level." (*People v. Bacigalupo, supra*, 1 Cal.4th at p. 153 (conc. opn. of Mosk, J.).) Numerous decisions of this court by many of its members establish the fact that factor (j) is potentially mitigating only. In her concurring and dissenting opinion herein, Justice Kennard proves the point beyond peradventure. Reason also establishes the fact. The question posed in factor (j) calls for one of two answers. A determination that the defendant was, in actuality, a minor accomplice may lead to the

conclusion that his culpability was less than that generally reflected by commission of the offense. But a determination that he did *not* play such a role simply does not lead to the conclusion that his culpability was greater. Loose and uncertain dictum arguably to the contrary, which appears in a single opinion that does not cite any authority or present any analysis, should be disapproved forthwith. It should not be used, as by the majority, to "create" a "conflict" where none exists.

V

Because the court committed reversible error by commenting as it did on the evidence and defendant's credibility, I would reverse the judgment.

MOSK, J.

No. CR23185
S004555

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

THE PEOPLE, Respondent

v.

WILLIAM ARNOLD PROCTOR, Appellant

Petition for rehearing DENIED.

Mosk, J. and Kennard, J. are of the opinion the petition should be granted.

March 10, 1993

/s/ L. [illegible]
Chief Justice

SUPREME COURT OF THE UNITED STATES

No. 93-5161

William Arnold Proctor,

Petitioner

v.

California

ON PETITION FOR WRIT OF CERTIORARI to the Supreme Court of California.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. This case is consolidated with No. 93-5131, *Paul Palalaua Tuilaepa v. California,* and a total of ninety minutes is allotted for oral argument.

December 6, 1993

Supreme Court, U.S.
FILED
JAN 27 1994
OFFICE OF THE CLERK

No. 93-5161

In The

Supreme Court of the United States

October Term, 1993

WILLIAM ARNOLD PROCTOR,

Petitioner,

v.

CALIFORNIA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of California

PETITIONER'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED

Does a death sentence violate the Eighth Amendment requirement that the jury be given "principled guidance" in determining who is to receive a death penalty, when that sentence is imposed by a jury instructed to weigh aggravating against mitigating factors, but:

(a) Permitted to consider undefined "circumstances of the crime," as well as other ambiguous terms, as aggravating factors;

(b) Not instructed whether listed factors are to be treated as aggravating or mitigating; and

(c) Encouraged to treat the absence of a mitigating factor as an aggravating circumstance?

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OPINION BELOW

The opinion of the California Supreme Court, dated December 28, 1992, is reported at 4 Cal.4th 499, 15 Cal.Rptr. 340, 842 P.2d 1100 [JA 95]. The California Supreme Court denied rehearing on March 10, 1993.[1]

JURISDICTIONAL STATEMENT

This Court has jurisdiction under 28 U.S.C. §1257.

APPLICABLE CONSTITUTIONAL, STATUTORY, AND OTHER PROVISIONS

In addition to the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution, this case involves California Penal Code §§190.1 through 190.4, set forth following the conclusion to this brief.

INTRODUCTION

California death penalty procedure, as applied to petitioner, did not give the jury meaningful guidance about how to determine whether to impose the death penalty. The vaguely written statute allowed the state to

[1] "JA" refers to the Joint Appendix. The record on appeal consists of the clerk's file, cited as "CT", and the reporter's transcripts from Shasta County, where the guilt phase was tried ("Shasta RT"), and Sacramento County, where the penalty phase was tried ("Sacto RT").

transform neutral factors and the absence of evidence into aggravating factors.

In California, death penalty cases are tried in separate phases. The trier of fact initially decides if the defendant is guilty of first degree murder. If so, it also decides whether one or more of 27 possible "special circumstances" exists (Penal Code §190.1(a)).[2] If any special circumstance is found true, the defendant is considered "death-eligible", and the case proceeds to a penalty phase (§190.2), at which the jury weighs aggravating factors against mitigating factors to determine whether to sentence the defendant to death or to life in prison without possibility of parole (§190.3).

Neither the list of factors petitioner's jury was instructed to consider, nor any of the individual factors on that list, provided the specific, objective standards this Court requires when a jury is instructed that aggravating factors play a central role in death penalty decision-making.

STATEMENT OF THE CASE

In April of 1982, petitioner, who was then twenty years old, was charged with rape, burglary, and first degree murder involving four "special circumstances" (killing in the course of burglary, killing in the course of

[2] The 1983 version of that statute had 19 subparts, one of which (§190.2(a)(17)) in turn lists nine separate circumstances. The 1993 version adds two more special circumstances.

rape, especially heinous killing,[3] and killing involving torture). The charges stemmed from discovery of the body of 55-year-old Bonita Stendal, who had died of asphyxiation by manual and ligature strangulation [Shasta RT 2875-2876]. Her body also showed stab wounds, injuries from seven to nine blows [Shasta RT 2876-2879, 2886, 2889-2922], and injuries near the vagina caused by a foreign object, possibly a penis [Shasta RT 2913-2920].

The prosecution connected petitioner to the crime by his palmprint on pamphlets in Ms. Stendal's house, a cigarette butt outside a window, a class in which petitioner was taught "trucker's knots," and abrasions and scratch marks on his legs similar to marks the coroner had seen in a sexual assault case [Shasta RT 2410-2411, 2442-2445, 2463-2465, 2495-2496, 2502-2511, 2540-2544, 2560-2568, 2730-2751, 2801-2831, 2828-2832, 2844, 2927-2928].

Petitioner had been at the home of a friend, Robert Manley, the night before Ms. Stendal was killed, but Manley testified that petitioner left at 8:30 p.m. [Shasta RT 2643, 2721-2722]. Manley had been petitioner's cohort in stealing beer in the past, and had made an obscene call to Ms. Stendal the weekend before her death [Shasta RT 2684-2685]. Manley had previously broken into the Stendal home at least twice, and spent a lot of time there with Ms. Stendal's son [Shasta RT 2672-2676, 2758-2764, 2768-2770]. There was no evidence of petitioner's involvement in any of Manley's break-ins.

[3] The "especially heinous" allegation was eventually stricken on petitioner's motion [CT 252-253].

After unsuccessful motions for change of venue [CT 176-177, 180, 196, 274-286], petitioner went to trial. The jury could not agree on guilt until the trial judge commented that he did not believe petitioner's testimony denying involvement in the offense [Shasta RT 3296-3303, 3330-3341], after which the jury found petitioner guilty of first degree murder with special circumstances of rape, torture and burglary [JA 4-6; CT 301-313].

A penalty trial began the morning after the guilt verdict. The jury announced it was deadlocked the same day, and the court ordered a mistrial [CT 314-315]. Shortly after, petitioner again moved for change of venue [CT 323-351]. This motion was granted, and the case was transferred to Sacramento County for retrial of the penalty phase only [CT 351-354]. The retrial was primarily a presentation of guilt phase evidence to the new penalty jury.

At the end of the retrial, the prosecutor argued his theories of first degree murder and special circumstances, and then told the jury that it was "obligated to return" a verdict of death if it found aggravating circumstances outweighed mitigating ones [Sacto RT 1474]. The prosecutor asserted that "there are only two mitigating circumstances and the rest in this case are aggravating," contending in effect that if there was no evidence of a mitigating factor, its absence constituted an aggravating circumstance [Sacto RT 1478]. He concluded with an exhortation that "under the law of California [a death penalty] is necessary" [Sacto RT 1483].

The trial court instructed the jury that petitioner "has heretofore been found guilty of murder in the first

degree" and that the three special circumstances also had been found true, but that such finding "does not in and of itself constitute an aggravating factor or factors." However, if the jury were satisfied beyond a reasonable doubt that petitioner was guilty it could "determine whether or not the crimes and the circumstances thereof constitute an aggravating factor" [JA 76; CT 402].

After defining reasonable doubt, the judge told the jury it should "consider, take into account, and be guided by the following factors, if applicable:[4]

> "(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true.
>
> "(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.
>
> "(c) The presence or absence of any prior felony conviction.
>
> "(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

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[4] Other than the bracketed material at the very end, this list is a verbatim extract from Penal Code §190.3. The specific factors will be identified in this brief by their statutory designations. For example, "circumstances of the crime" is Factor (a); age is Factor (i).

"(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

"(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

"(g) Whether or not defendant acted under extreme duress or under the substantial domination of another person.

"(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the effects of intoxication.

"(i) The age of the defendant at the time of the crime.

"(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

"(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime, [including but not limited to the defendant's character, background, history, mental condition and physical condition]" [JA 77-78; CT 403-404].

This was followed by lengthy jury instructions explaining how to evaluate evidence, and specifying the elements of the crimes and special circumstances the Shasta County jury had found true [CT 405-453]. Then, the judge told the jury it had the duty to decide whether

the punishment should be death or life in prison without possibility of parole, and reiterated that the jury should "consider, take into account, and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed" [JA 79; CT 454]. There was no instruction about which factors were aggravating and which were mitigating, nor any instruction defining the words "aggravating" and "mitigating."

The instructions directed the jury that it "shall impose" a death sentence if it found aggravating circumstances to outweigh mitigating circumstances, with aggravating factors to be weighed if the jury found them beyond a reasonable doubt [JA 79; CT 454].

The jury returned a death verdict on a form which read as follows:

> "We, the jury in the above-entitled cause, find that the AGGRAVATING CIRCUMSTANCES outweigh the mitigating circumstances *and therefore* impose the penalty of DEATH as a result of defendant's conviction of murder in the first degree with special circumstances found to be true, relating to the death of BONNIE STENDAL" [JA 94; CT 479, emphasis added].

California law provides for an automatic motion for modification of death judgments (Penal Code §190.4(e)). The trial court denied modification [CT 528-555A]. On petitioner's automatic appeal, the California Supreme Court affirmed the conviction and death sentence, holding that the phrase "circumstances of the crime" is not too vague to define an aggravating factor [JA 156-157; 4 Cal.4th at 550-551], and that the trial judge did not misuse

other factors on the automatic review of the sentence [JA 157-164; 4 Cal.4th at 551-556].

SUMMARY OF ARGUMENT

When a State directs jurors to weigh specified factors in aggravation as the basis for deciding whether to impose a death penalty, the definition of those factors given to the jury must be clear and precise in order to protect against arbitrary and capricious capital sentencing decisions (*Stringer v. Black*, ___ U.S. ___, 117 L.Ed.2d 367, 112 S.Ct. 1130, 1139 (1992)).

California imposes the death penalty on some, but not all, defendants found guilty of first degree murder with special circumstances. California sentencing juries are directed to weigh aggravating factors against mitigating factors. The trial judge reads a list of factors for the jury to weigh, but does not explain which of the listed factors should be treated as aggravating or mitigating, nor even what the words "aggravating" and "mitigating" mean.

This indiscriminate commingling of aggravating and mitigating factors in a single list affronts the Eighth Amendment rule that "[i]f a State has determined that death should be an available penalty for certain crimes, then it must administer that penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not" (*Spaziano v. Florida*, 468 U.S. 447, 460, 82 L.Ed.2d 340, 1045 S.Ct. 3154 (1984)).

As a result of this approach, in many cases (including petitioner's), California prosecutors invite juries to convert the absence of mitigating factors into an aggravating factor or factors, distorting the weighing process by inserting such illusory aggravators. The statute permits arbitrary inconsistencies in the use of identical penalty factors; not even the justices of the California Supreme Court have been able to agree on consistent interpretations. The result is unprincipled, crazy-quilt application of the ultimate penalty.

Moreover, one of the factors on the statutory list is "the circumstances of the crime and the existence of any special circumstances found to be true". This factor is all-encompassing and undifferentiating, and therefore distorts the jury's exercise of discretion in imposing death by injecting arbitrariness. Prejudice to petitioner was especially likely because petitioner's jury was directed that, if it found aggravating factors to outweigh mitigating ones, the death penalty was mandatory.

ARGUMENT

The death penalty is different from any other punishment. This Court has restated that truism time and again (See, e.g., *Harmelin v. Michigan*, ___ U.S. ___, 115 L.Ed.2d 836, 111 S.Ct. 2680, 2702 (1991) (majority opinion and concurring opinion of Kennedy, J.); *California v. Ramos*, 463 U.S. 992, 998-999, 77 L.Ed.2d 1171, 103 S.Ct. 3446 (1983); *Beck v. Alabama*, 447 U.S. 625, 638, 65 L.Ed.2d 392, 100 S.Ct. 2382 (1980); *Gardner v. Florida*, 430 U.S. 349, 357, 51 L.Ed.2d 393, 97 S.Ct. 1107 (1977); *Woodson v. North*

Carolina, 428 U.S. 280, 305, 49 L.Ed.2d 944, 96 S.Ct. 2978 (1976); *Gregg v. Georgia*, 428 U.S. 153, 181-188, 49 L.Ed.2d 859, 96 S.Ct. 2909 (1976); *Furman v. Georgia*, 408 U.S. 238, 286-291, 33 L.Ed.2d 346, 92 S.Ct. 2726 (1972) (opinion of Brennan, J.), 306-310 (opinion of Stewart, J.); *Reid v. Covert*, 354 U.S. 1, 77-78, 1 L.Ed.2d 1148, 77 S.Ct. 1222 (1957) (concurring opinion of Harlan, J.)).

"The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special ' "need for reliability in the determination that death is the appropriate punishment" ' in any capital case" (*Johnson v. Mississippi*, 486 U.S. 578, 584, 100 L.Ed.2d 575, 108 S.Ct. 1981 (1988)). "[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action" (*Gregg v. Georgia, supra*, 428 U.S. at 189).

The jury instructions which led to petitioner's death sentence violated that mandate.

I.

WHEN A STATE USES "AGGRAVATING FACTORS" TO MAKE DEATH PENALTY DECISIONS, THE EIGHTH AMENDMENT REQUIRES THAT SUCH FACTORS PROVIDE CLEAR AND SPECIFIC GUIDANCE.

Modern American death penalty jurisprudence attempts to provide a process which "will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake"

(*Eddings v. Oklahoma*, 455 U.S. 104, 118, 71 L.Ed.2d 1, 102 S.Ct. 869 (1982) (O'Connor, J., concurring). Thus, a death sentence may not stand where the defendant has been precluded from confronting or rebutting penalty phase evidence (*Gardner v. Florida*, 430 U.S. 349, 362, 51 L.Ed.2d 393, 97 S.Ct. 1197 (1977); *Skipper v. South Carolina*, 476 U.S. 1, 90 L.Ed.2d 1, 106 S.Ct. 1669 (1986), or has been permitted to consider an aggravating circumstance that lacks evidentiary support (*Sochor v. Florida*, ___ U.S. ___, 119 L.Ed.2d 326, 112 S.Ct. 2114 (1992)). Likewise, a death sentence is impermissible where the sentencer has considered unreliable evidence (*Johnson v. Mississippi, supra*, 486 U.S. 578), or has been instructed in vague terms (*Maynard v. Cartwright*, 486 U.S. 356, 100 L.Ed.2d 372, 108 S.Ct. 1853 (1988)). The common theme in these cases is that the path to the gas chamber must limit the opportunity for arbitrary choices and unfair procedures (*Sawyer v. Whitley*, 505 U.S. ___, 120 L.Ed.2d 269, 112 S.Ct. 2514, 2520 (1992)). While there is "no one right way for a State to set up its capital sentencing scheme" (*Spaziano v. Florida, supra*, 468 U.S. at 464 (1984); *Baldwin v. Alabama*, 472 U.S. 372, 389, 86 L.Ed.2d 300, 105 S.Ct. 2727 (1985)), whatever process a State chooses to adopt must minimize the risk of capricious imposition of the death penalty. The essence of this requirement, flowing from the Court's holdings in *Furman v. Georgia, supra*, 408 U.S. at 313 (White, J., concurring) and *Gregg v. Georgia, supra*, 428 U.S. at 189, is that "[a] capital sentencing scheme must . . . provide a 'meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not' " (*Godfrey v. Georgia*, 446 U.S. 420, 427-428, 64 L.Ed.2d 398, 100 S.Ct. 1759 (1980), internal

quotation marks omitted. See also, *Maynard v. Cartwright, supra,* 486 U.S. at 362-363).

> "When a state chooses to rely upon the presence of certain aggravating factors in order to satisfy the fundamental constitutional requirement of sufficiently minimizing the risk of wholly arbitrary and capricious action, this Court has repeatedly held that a state's aggravating factors must furnish the sentencer with 'clear and objective standards' that provide 'specific and detailed guidance' "
>
> *Lewis v. Jeffers,* 497 U.S. 764, 774, 111 L.Ed.2d 606, 110 S.Ct. 3092 (1990), quoting
>
> *Godfrey v. Georgia, supra,* 446 U.S. at 428;
>
> *Gregg v. Georgia, supra,* 428 U.S. at 198;
>
> *Proffitt v. Florida,* 428 U.S. 242, 253, 49 L.Ed.2d 913, 96 S.Ct. 2960 (1976).

Following the Court's announcement of this requirement in *Furman,* most states undertook to meet it through the approach foreshadowed by the ALI Model Penal Code, using "aggravating circumstances" and "mitigating circumstances" to guide the sentencer's discretion. The states adopted numerous variants of the aggravating/mitigating model, but all of them had a simple, commonsense core. *Aggravating* circumstances were a means for identifying murders that "are particularly serious or for which the death penalty is peculiarly appropriate" (*Gregg v. Georgia, supra,* 428 U.S. at 222 (White, J., concurring)). *Mitigating* circumstances were a means of asking whether there were "any special facts about this defendant [or his

or her crime] that mitigate against imposing capital punishment (e.g., his youth)" (*Id.* at 197 (opin. of Stewart, Powell, Stevens, JJ.)).

Under the various state systems, "death eligibility" may be established solely by conviction of a specifically defined crime, or by conviction of a crime plus a finding of one or more aggravating or (as in California) special circumstances. After this initial finding, in "non-weighing" states (such as Georgia), "aggravating factors as such have no specific function in the jury's decision whether a defendant who has been found to be eligible for the death penalty should receive it under all the circumstances of the case" (*Stringer v. Black, supra,* ___ U.S. ___, 112 S.Ct. at 1136. See also, *Zant v. Stephens,* 462 U.S. 863, 873-874, 77 L.Ed.2d 235, 103 S.Ct. 2733 (1983)). In other, "weighing" states (such as Mississippi and California; please see Section II, below), the actual decision to impose the death penalty requires the jury to weigh the aggravating factor or factors against the mitigating factors.

As this Court has reviewed the various state statutes, it has consistently held that, in weighing states, "use of a vague or imprecise aggravating factor in the weighing process invalidates the sentence and at the very least requires constitutional harmless-error analysis or reweighing in the state judicial system" (*Stringer v. Black, supra,* ___ U.S. ___, 112 S.Ct. at 1140).

The logic of the *Stringer* rule is unmistakable. An aggravating circumstance formula circumscribes jury discretion by focusing it. In that situation, it is up to the courts to guarantee that the focusing is not done through

a distorting lens. Distortion allows the prosecution to misdirect the jury's attention to misleading and nonsensical arguments, creating the danger of capricious action motivated by illusory factors.

At the separate sentencing hearing in *Stringer,* the jury found three statutory aggravating factors. Before this Court, petitioner argued that because *one* of these aggravating factors – authorizing a death sentence for an "especially heinous, atrocious or cruel" murder – was unconstitutionally vague, his death sentence was infected with constitutional error under *Godfrey* and *Maynard.* The State of Mississippi contended, however, that because the narrowing function that made a defendant death-eligible was performed at the guilt phase, there was no impropriety in relying on a vague factor which merely guided the jury's discretion at the sentencing phase.

This Court concluded otherwise, confirming that *Godfrey* and *Maynard* apply not only to circumstances that make a defendant death-eligible, but also to aggravating factors used solely in the weighing process:

> "[I]f a state uses aggravating factors in deciding who shall be eligible for the death penalty *or* who shall receive the death penalty, it cannot use factors which as a practical matter fail to guide the sentencer's discretion.
>
> * * *
>
> " . . . Although our precedents do not require the use of aggravating factors, they have not permitted a State in which aggravating factors are decisive to use factors of vague or imprecise content. A vague aggravating factor employed for the purpose of determining whether a defendant is eligible for the death penalty fails to channel the sentencer's discretion. A vague aggravating factor used in the weighing process is in a sense worse, for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance."
>
> *Stringer v. Black, supra,* ___ U.S. at ___, 112 S.Ct. at 1139 (emphasis added).

Stringer does not stand alone; it is one of several decisions of this Court evaluating aggravating factors for clarity, objectivity and principled guidance in situations where the aggravating factor at issue had no role in the death-eligibility decision, but was relevant only in the jury's subsequent weighing of considerations for and against death (*Arave v. Creech,* 507 U.S. ___, 113 S.Ct. 1534 (1993) (*Godfrey* applied to assess constitutionality of aggravating factor even though unchallenged aggravators remained to make defendant death eligible in Idaho); *Sochor v. Florida, supra,* 112 S.Ct. at 2119 (same); *Espinosa v. Florida,* 505 U.S. ___, 120 L.Ed.2d 854, 112 S.Ct. 2926 (1992) (same); *Walton v. Arizona,* 497 U.S. 639, 111 L.Ed.2d 511, 110 S.Ct. 3047 (1990) (same)). State courts throughout the country have likewise recognized that *Godfrey* applies to aggravating factors used in the penalty determination even where the defendant has been properly found death-eligible at the guilt phase (e.g., *Wilson v. State,* 295 Ark. 682, 751 S.W.2d 734, 737-739 (Ark. 1988); *State v. Breton,* 212 Conn. 258, 562 A.2d 1060, 1063-1066 (Conn. 1989); *Haney v. State,* 603 So.2d 368, 387, cert. denied ___ U.S. ___, 122 L.Ed.2d 687 (Ala.Cr.App. 1991)).

The test set forth in *Godfrey* must be applied in California.

II.

AGGRAVATING FACTORS PLAYED A CRITICAL ROLE IN THE DEATH PENALTY DECISION PROCESS IN PETITIONER'S CASE.

Petitioner's jury was instructed that its decision was to be controlled by the weight of aggravating versus mitigating factors:

> "If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you *shall* impose a sentence of death" [JA 79, emphasis added; CT 454].[5]

Lest any juror have an iota of doubt, the prosecutor stressed that the jury's weighing was critical to the process of selecting a penalty:

> "So, if you conclude that the aggravating circumstances outweigh the mitigating circumstances, you *are obligated* to return a verdict of death" [JA 23; Sacto RT 1474, 1483, emphasis added].

---

[5] After petitioner's trial, the California Supreme Court disapproved any future use of the statute's "shall impose" language in penalty phase jury instructions because that phraseology might mislead jurors about the scope of their sentencing discretion (*People v. Brown*, 40 Cal.3d 512, 220 Cal.Rptr. 637, 709 P.2d 440 (1985), reversed on other grounds, *California v. Brown*, 479 U.S. 538, 93 L.Ed.2d 934, 107 S.Ct. 837 (1987)). The *Brown* court, however, reaffirmed that the jury was to weigh the aggravating and mitigating factors in reaching its sentencing decision (*Id.* at 543-544).

The verdict forms likewise reinforced to the jury that, if it found aggravating factors to outweigh mitigating ones, it should "therefore impose a penalty of death" [JA 94; CT 479], and on review of the sentence pursuant to Penal Code §190.4, the trial judge assumed that the "aggravating circumstances" had controlling importance:

> "The aggravating circumstances do in fact outweigh the mitigating circumstances and therefore . . . the jury's verdict is not only supported by the weight of the evidence, but the Court in its independent review of all the evidence finds the jury's verdict is not contrary to the law or the evidence" [Sacto RT 1628-1629].

In its evaluation of penalty phase jury instruction error, the state supreme court likewise focused on the importance of the weighing process as an element of the jury's "sentencing responsibility":

> "From the arguments both of the prosecutor and defense counsel, and from the instructions, the jurors would have understood that they were required to determine the appropriate penalty for defendant *by weighing the enumerated factors*" [JA 153; 4 Cal.4th at 549, emphasis added. See also JA 164, 4 Cal.4th at 556].

The jury was instructed that it must find aggravating factors beyond reasonable doubt [JA 76, 80; CT 402, 454]. Thus, it is clear the jury actually found at least one aggravating factor to exist, although it is impossible to know which one or ones. Given the central role played by aggravating factors in the argument and jury instructions which led to petitioner's death sentence, and in the state court's subsequent review of that sentence, the principles

set forth in *Stringer v. Black, Maynard v. Cartwright* and *Godfrey v. Georgia* obviously control. *Any* invalid factor used in that process amounted to a "thumb on death's side of the scale" (*Stringer v. Black, supra,* ___ U.S. ___, 112 S.Ct. at 1137).

The day after this Court's grant of certiorari in this case, the state court suggested a contrary conclusion in *People v. Bacigalupo,* 6 Cal.4th 457, 24 Cal.Rptr. 808, 862 P.2d 808 (1993), on remand from *Bacigalupo v. California,* ___ U.S. ___, 121 L.Ed.2d 5, 113 S.Ct. 32 (1992). There, the California court concluded that "[t]he section 190.3 'aggravating' factors in California's capital scheme do no more than direct attention" to "facts about the offense and the offender that will weigh in the sentencing decision in favor of the more severe penalty of death," and therefore the Eighth Amendment principles articulated in *Godfrey* and *Maynard, supra,* do not apply (6 Cal.4th at 477).

Even if that were an accurate interpretation of this Court's Eighth Amendment jurisprudence – but see discussion at pages 10-16, above – the *Bacigalupo* rationale would not change the outcome of petitioner's case, where aggravating factors did not merely "direct attention."

Petitioner's jury was explicitly instructed that in the weighing process it should not only "consider" and "take into account" the factors listed in §190.3, but it should be "guided by" them [JA 77, 79, 80; CT 403, 454]. To guide means "to regulate and manage, direct, or supervise esp. toward some desirable end" (Webster's Third New International Dictionary, p. 1009). The image of a guided missile, going directly to its target, comes to mind.

Petitioner's jury was also instructed, in effect, that its decision should be regulated and directed by a list of factors which (as petitioner will show in Sections III and IV) is so vaguely worded as to be meaningless. Further, the jury was exhorted by the prosecutor that it was "obligated to," and told by the trial judge that it "shall," impose the death penalty if it found aggravating factors outweighed mitigating ones, magnifying the untoward effect of the invalid factors.

With the jury's obligation stated in that manner, application of any invalid factor would create unmistakable danger of randomness and caprice in the jury's decision.

III. THE "CIRCUMSTANCES OF THE CRIME" FACTOR DID NOT GIVE PETITIONER'S JURY MEANINGFUL GUIDANCE FOR MAKING A LIFE OR DEATH DECISION.

In order to satisfy the Eighth Amendment, factors which are weighed by a capital sentencer must "furnish principled guidance for the choice between death and a lesser penalty" (*Richmond v. Lewis,* ___ U.S. ___, 121 L.Ed.2d 411, 113 S.Ct. 528, 532 (1992); *Espinosa v. Florida, supra,* 505 U.S. ___, 112 S.Ct. at 2929; *Sochor v. Florida, supra,* 112 S.Ct. 2114; *Clemons v. Mississippi,* 494 U.S. 738, 108 L.Ed.2d 725, 110 S.Ct. 1441 (1990); *Maynard v. Cartwright, supra,* 486 U.S. at 362-363).

Factor (a) of Penal Code §190.3, the first item petitioner's jury was told to "consider, take into account, and be guided by" in the weighing process, was worded as follows:

> "The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true" [JA 77; CT 403].

This language does not articulate a "clear and objective," "specific," or "detailed" standard (*Lewis v. Jeffers, supra,* 497 U.S. at 774; *Godfrey v. Georgia, supra,* 446 U.S. at 428; *Gregg v. Georgia, supra,* 428 U.S. at 198; *Proffitt v. Florida, supra,* 428 U.S. at 253).

A. GENERIC REFERENCE TO CIRCUMSTANCES DOES NOT ASSIST THE JURY IN DISTINGUISHING ONE CASE FROM ANOTHER.

By including everything, Factor (a) defines nothing. It is ambiguous, rather than clear and specific, and therefore violates the Eighth Amendment.

Every case has circumstances.[6] The "circumstances of the crime" aggravating factor is equally applicable to every defendant who comes before a penalty phase jury. It does not answer the crucial question: How should the jury distinguish those who live from those who die?

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[6] The word "circumstances" means:

> "A specific part, phase, or attribute of the surroundings or background of an event, fact, or thing or of the prevailing conditions in which it exists or takes place: a condition, fact, or event accompanying, conditioning, or determining another:. . . . the sum of essential and environmental characteristics: arrangement, situation, composition or nature of an event or thing . . . "
>
> *Webster's Third International Dictionary,* p. 450.

Using the word "circumstances" as an aggravating factor exemplifies arbitrariness and caprice. It is precisely analogous to the parent-child dialogue: "Why did you do that?" "Because." Factor (a), presented to the jury without any explanation, gave no guidance as to what came within the scope of "circumstances of the crime," or what might make those circumstances "aggravating." It allowed the jury to treat any irrelevancy which may have caught its fancy as a "circumstance of the crime."[7]

There must be a " 'meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not'," so that similar facts will engender similar results (*Gregg v. Georgia, supra,* 428 U.S. at 188, quoting *Furman v. Georgia, supra,* 408 U.S.

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[7] Reviewing courts are intimately familiar with the problem of applying an overgeneral standard. Thus, Justice Kennedy made this observation about the difficulty of reviewing punitive damage awards:

> "To ask whether a particular award of punitive damages is grossly excessive begs the question: excessive in relation to what? The answer excessive in relation to the conduct of the tortfeasor may be correct, but it is unhelpful, for we are still bereft of any standard by which to compare the punishment to the malefaction that gave rise to it. A reviewing court employing this formulation comes close to relying upon nothing more than its own subjective reaction to a particular punitive damages award in deciding whether the award violates the Constitution. This type of review, far from imposing meaningful, law-like restraints on jury excess, could become as fickle as the process it is designed to superintend."
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> *TXO Production Corp. v. Alliance Resources Corp.,* ___ U.S. ___, ___, 125 L.Ed.2d 366, 113 S.Ct. 2711, 2725 (1993) (concurring opin. of Kennedy, J.).

at 313 (concurring opin.)). Using Factor (a) as an aggravating circumstance, however, a jury can give one defendant his life and put another to death without any means for objective distinction. There is no consistent relationship between fact and result from this kind of jury instruction.

That failing can be seen in use of Factor (a) in petitioner's case. The Court has "plainly rejected the submission that a particular set of facts surrounding a murder, however shocking they might be, were enough in themselves, and without some narrowing principle to apply to those facts, to warrant the imposition of the death penalty" (*Maynard v. Cartwright, supra,* 486 U.S. at 363). Yet, the prosecutor argued below that the death penalty was warranted under Factor (a) because "this was a brutal murder" [JA 25; Sacto RT 1477].

There is no such thing as a first degree murder which is *not* horrible. As the late Justice Stewart observed: "A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman' " (*Godfrey v. Georgia, supra,* 446 U.S. at 428-429, 64 L.Ed.2d 498, 100 S.Ct. 1759). The willful, deliberate, premeditated taking of a human life with malice aforethought is a hideous act.

Nevertheless, California voters did not purport to impose the death penalty on every murderer, nor even on every murderer as to whom one or more special circumstances is found. Instead, §190.3 of the California statute, which fills more than a page of single-spaced typing, spells out an elaborate process under which the jury is instructed to weigh aggravating and mitigating factors. In

light of the "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative" (*Colautti v. Franklin,* 439 U.S. 379, 392, 58 L.Ed.2d 596, 99 S.Ct. 675 (1979)), one must assume that the penalty phase was not intended to be a meaningless exercise, but an opportunity for jurors to make a rational choice between death and a lesser penalty.

Factor (a), however, is so all-inclusive that the prosecutor here was able to use it to argue that petitioner should be put to death for a reason that could be advanced in every murder prosecution. A factor that indiscriminate does not provide "principled" guidance; it does not provide any guidance whatsoever. Yet that is the consequence of identifying "circumstances of the crime" as an aggravating factor.[8]

B. THIS COURT HAS NEVER AUTHORIZED USE OF THE PHRASE "CIRCUMSTANCES OF THE CRIME" AS AN AGGRAVATING FACTOR.

The California Supreme Court's determination to uphold petitioner's death sentence rested on an invalid assumption that this Court has approved generalized reference to circumstances of the crime as an aggravating factor:

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[8] The amicus curiae brief of the California Appellate Project collects several more examples of how prosecutors have exploited the overly elastic language of Factor (a), demonstrating the unconstitutional vagueness of that aggravating factor.

> "The United States Supreme Court itself has established that the circumstances surrounding a capital offense constitute one of the criteria upon which the jury *should* base its penalty determination. [Citations.] The high court has not stated or implied that the factor of the 'circumstances of the offense' is unconstitutionally vague" [JA 156; 4 Cal.4th at 551, emphasis in original].

The state court cited *Penry v. Lynaugh*, 492 U.S. 302, 318, 106 L.Ed.2d 256, 109 S.Ct. 2934 (1989); *Booth v. Maryland*, 482 U.S. 496, 96 L.Ed.2d 440, 107 S.Ct. 2529 (1987), and *Jurek v. Texas*, 428 U.S. 262, 274, 49 L.Ed.2d 929, 96 S.Ct. 2950 (1976) for its conclusion [JA 156; 4 Cal.4th at 551].

It is true that each of those decisions speaks about jury consideration of the circumstances of the offense. But references in the three opinions to the defendant's right to have the jury consider evidence of the circumstances surrounding an offense does not validate the use of that phrase to define aggravating factors. Judicial opinions, written for judges and lawyers who read the opinions with a background knowledge of constitutional principle, can be written in a kind of shorthand unsuitable for instructions to jurors, who come to their task with no understanding of the law. Language suitable for opinions is not always specific enough to satisfy the Eighth Amendment requirement of providing objective guidance to lay jurors.

Moreover, *Penry* and *Jurek* were addressing a defendant's right to have the jury consider the circumstances of the offense as part of his case in mitigation (*Penry, supra*, 492 U.S. at 313-316; *Jurek, supra*, 428 U.S. at 274-276). *Booth* explained that the character of the individual defendant

and the circumstances of the crime were relevant facets of the constitutionally required " 'individualized determination' of whether the defendant should be executed" (482 U.S. at 502, quoting *Zant v. Stephens, supra*, 462 U.S. at 879).[9]

None of these cases suggested that "the circumstances of the crime," without some limiting definition, would satisfy the requirement of providing the necessary "specific and detailed guidance" required to define aggravating factors.

IV. THE UNDIFFERENTIATED LIST OF PENALTY FACTORS READ TO THE JURY DID NOT PROVIDE MEANINGFUL GUIDANCE.

While some death penalty statutes specify which factors are aggravating and which are mitigating, California's Penal Code §190.3 simply lists factors without classifying them. Tracking the language of the statute, the instructions here told petitioner's jury to "consider, take into account and be guided by" the statutory list in the weighing process, leaving it to the jury to decide how to treat each factor.

By lumping aggravating and mitigating factors into a single list, California has created a reasonable likelihood that juries will treat the absence of factors which should establish mitigation, or have no effect at all, as aggravating factors to be weighed in favor of death. This is

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[9] In *Payne v. Tennessee*, ___ U.S. ___, 111 S.Ct. 2597 (1991), this Court overruled *Booth's* holding barring victim impact evidence.

precisely what the prosecutor's argument invited the jury to do at petitioner's trial.

The California Supreme Court has construed §190.3 and held that at least six of the factors can be given mitigating effect only. These are: extreme mental or emotional disturbance (Factor (d)); victim participation or consent (Factor (e)); defendant's reasonable belief in moral justification or extenuation (Factor (f)); duress or substantial domination by another person (Factor (g)); impairment by mental disease, defect, or intoxication (Factor h)); and accomplice/relatively minor participation by defendant (Factor (j)) (*People v. Davenport*, 41 Cal.3d 247, 288-289, 221 Cal.Rptr. 794, 710 P.2d 861 (1985); *People v. Melton*, 44 Cal.3d 713, 769, 244 Cal.Rptr. 867, 750 P.2d 741 (1988), cert. denied 488 U.S. 934; *People v. Lucero*, 44 Cal.3d 1006, 1031, fn. 15, 245 Cal.Rptr. 185, 750 P.2d 1342 (1988); *People v. Hamilton*, 48 Cal.3d 1142, 1184, 259 Cal.Rptr. 701, 774 P.2d 730 (1989), cert. denied 49 U.S. 1039).[10] These factors are irrelevant if there is no evidence on the particular issue.

The problem is that, while California decisions establish these rules limiting application of the Penal Code §190.3 factors, no one explained that to petitioner's jury.[11]

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[10] Concerning Factor (j), please see footnote 13, below.

[11] The California Supreme Court has declined to require either that irrelevant factors be stricken from the list, or that the jury be advised that certain factors can be given mitigating effect only (e.g., *People v. Sims*, 5 Cal.4th 405, 465, 20 Cal.Rptr. 537, 853 P.2d 992 (1993); *People v. Raley*, 2 Cal.4th 870, 919, 8 Cal.Rptr. 678, 830 P.2d 712 (1992), cert. denied ___ U.S. ___, 122 L.Ed.2d 733; *People v. Miranda*, 44 Cal.3d 57, 104-105, 241 Cal.Rptr. 594, 744 P.2d 1127 (1987), cert. denied 486 U.S. 1038; *People v. Ghent*, 43 Cal.3d 739, 776-777, 239 Cal.Rptr 82, 739 P.2d 1250 (1987), cert. denied 485 U.S. 929; *People v. Jackson*, 28 Cal.3d 264, 316, 168 Cal.Rptr. 603, 618 P.2d 149 (1980), cert. denied 450 U.S. 1035).

As a result, the jury was invited to weigh in aggravation, and may have rested its verdict on, illusory circumstances.

The failure to tell the jury which factors could have only mitigating effect permitted the prosecutor to argue that "there were only two mitigating circumstances and the rest in this case are aggravating" [JA 25; Sacto RT 1476]. He counted factors on the basis of an assumption that a nonexistent mitigating factor should be treated as an aggravating circumstance, including in his list the exclusively mitigating factors set forth above [JA 26-28; Sacto RT 1476-1479]. Thus, the prosecutor asserted that because petitioner was not mentally ill, his rationality constituted a circumstance in aggravation:

> "There was no evidence that he had any kind of a mental derangement, other than what anybody who would do that would have. And the evidence was that he, again, that he was rational at the time of this offense, that he knew what he was doing, he knew it was wrong, that's why he cleaned up and that's why he took precautions not to get caught. [¶] . . . He didn't want to get caught. He knew what he was doing. *That is a circumstance in aggravation*" [JA 26; Sacto RT 1477-1478, emphasis added].

In a similar vein, the prosecutor maintained that the victim's lack of participation in the killing, petitioner's

lack of reasonable belief that the offense was morally justified, and the fact that petitioner was not intoxicated, as well as the fact that petitioner acted without an accomplice, all should be treated as aggravating circumstances [JA 26-27; Sacto RT 1479-1481].[12]

If absence of mitigating evidence is tantamount to an aggravating circumstance, and both the presence and the absence of a factor can constitute aggravation, the scales are tipped inexorably in death's direction. This approach is impossible to reconcile logically with the principle that the death penalty is never automatic.

Under this aggravation-by-absence approach, whenever there is no evidence on a factor listed in Penal Code §190.3, the prosecutor will be able to put another aggravating factor on death's side, to counterbalance whatever mitigating evidence a defendant does produce. This is a gimmick, not a principled means of distinguishing defendants who do and do not deserve the death penalty (*Maynard v. Cartwright, supra,* 486 U.S. at 362).

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[12] The trial court did give an instruction designed to prevent the jury from aggravating on the basis of a mere failure of proof (for example, if the jury was left uncertain whether petitioner was intoxicated or had acted as an accomplice):

> "If a factor is not found by you to be a mitigating factor, that in and of itself does not make that factor an aggravating factor. In order for a factor to be considered an aggravating factor, you must be satisfied beyond a reasonable doubt that the factor does exist, and it is only if you determine that the factor exists beyond a reasonable doubt that you may consider the factor an aggravating factor" [JA 80; CT 458].

Two examples of how individual penalty phase factors are used arbitrarily appear on the record of this case. Whereas most jurisdictions treat "youth" as mitigating, California puts the "age of the defendant" into its all-purpose list as Factor (i). Consequently, California prosecutors and judges have in some cases treated defendants' ages as aggravating regardless of what those ages were, and in other cases treated identical ages as aggravating, mitigating or neutral, apparently by whim.

> "If the sentencer fairly could conclude that an aggravating circumstance applies to *every* defendant eligible for the death penalty, the circumstance is constitutionally infirm."
>
> *Arave v. Creech, supra,* 507 U.S. at ___, 113 S.Ct. at 1542.

Everyone has an age. Instructing a jury in terms of Factor (i) permits virtually any aspect of a defendant's character, no matter how irrelevant, to be become an aggravating factor under the guise of "age." The opening brief in *Tuilaepa v. California,* No. 93-5131, discusses at some length the contradictory ways California prosecutors have used Factor (i).

In similar disregard for jury guidance, California puts "relatively minor" accomplice liability on the same undifferentiated list, as Factor (j). Prosecutors have seized on that to argue that a murder committed without accomplices is aggravated. The prosecutor suggested that in petitioner's case [JA 28-29; Sacto RT 1479-1481], and the trial judge agreed [Sacto RT 1627-1628]. As the debate between the majority and concurring opinions below

attests,[13] the California Supreme Court has not yet been able to reach a consistent conclusion about whether that argument is correct. If justices of the California Supreme Court cannot agree amongst themselves how a penalty factor works, one cannot expect a lay jury to apply that factor in a rational and consistent manner.

V. THE COURT SHOULD REVERSE THE DEATH SENTENCE AND REMAND WITH DIRECTIONS TO CONDUCT A NEW PENALTY TRIAL WITH PROPERLY DEFINED AGGRAVATING FACTORS.

The combination of defects in the factors submitted for the jury's consideration with the instruction that, if the jury found aggravation to outweigh mitigation, it "shall impose" the death penalty, could not help but tip the scales toward death. Therefore, the judgment must be reversed.

Ordinarily, when this Court reverses a death sentence because the sentencer has considered an invalid aggravating factor, the state supreme court has three alternatives: It can remand for resentencing, reweigh the evidence itself without the invalid factor, or determine that the

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[13] The state supreme court acknowledged that 13 of its past decisions had treated Factor (j) as mitigating only, yet upheld its use as aggravating in petitioner's case, citing a recent decision [JA 159-60; 4 Cal.4th at 553-554]. In other words, the state has now resurrected uncertainty about whether Factor (j) can be given aggravating effect, illustrating the difficulty a jury must face in attempting to discover the legal rules governing its consideration of the sentencing factor without guidance in the jury instructions.

factfinder's weighing of the invalid factor was constitutionally harmless error (*Clemons v. Mississippi, supra*, 94 U.S. 752-753, 110 S.Ct. at 1451). In this case, only the first of those alternatives will guarantee that petitioner's Eighth and Fourteenth Amendment rights are protected.

In California, a death penalty defendant is entitled to have a jury decide the penalty regardless of whether the conviction came about by reason of a guilty plea, court trial or jury trial (see Penal Code §190.4).

> "[I]t is not correct to say that the defendant's interest in the exercise of that discretion is merely a matter of state procedural law. The defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion [Citations], and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State."
>
> *Hicks v. Oklahoma*, 447 U.S. 343, 346, 65 L.Ed.2d 175, 100 S.Ct. 2227 (1980).

A fortiori, when the interest is not just liberty, but the defendant's life, he has a legitimate expectation of a jury decision.

The California Supreme Court could not fairly find the errors discussed here to be harmless beyond reasonable doubt. There is no way of knowing how the jury might have used the circumstances of the crime factor, which factors the jury treated as aggravating circumstances and which as mitigating, or how much weight was assigned to any factor. Thus, any conclusion that such errors were harmless would be purely speculative.

In order for an appellate court to conduct harmless error analysis, under the instructions given in petitioner's case, it would first have to step into the jury's shoes (in violation of due process) and arbitrarily assign to jurors an interpretation of the instructions which may not be the one the jury used at all.

The state cannot deny a defendant "the jury sentence to which he was entitled under state law, simply on the frail conjecture that a jury might have imposed a sentence equally as harsh" had it been correctly instructed (*Hicks v. Oklahoma, supra,* 447 U.S. at 346, emphasis by the Court). "Such an arbitrary disregard of the petitioner's right to liberty is a denial of due process" (*Id.*).

The only appropriate remedy, therefore, is to reverse and remand with directions that the California Supreme Court order a new penalty trial for petitioner, to be conducted with appropriate limitations on use of the §190.3 factors,[14] or in the alternative to order that petitioner be sentenced to life in prison without possibility of parole.

CONCLUSION

"The generality of a law inflicting capital punishment is one thing. What may be said of the validity of a law on the books and what may be done with the law in its application do, or may, lead to quite different conclusions" (*Furman, supra,* 408 U.S. at 242). What was done with Penal Code §190.3 in this case produced a death

[14] Presumably, the California Supreme Court would determine these limitations based on this Court's guidance.

sentence which unmistakably violated the Eighth Amendment.

Justice "is traditionally thought of as maintaining or restoring a balance or proportion, and its leading precept is often formulated as 'Treat like cases alike'; though we need to add to the latter 'and treat different cases differently' " (H.L.A. Hart, *The Concept of Law,* p. 155 (1961)). The jury instructions failing to distinguish between aggravating and mitigating factors, and allowing consideration of undefined "circumstances of the crime" as an aggravating factor, made such treatment impossible. By failing to give the jury principled guidance through clear and objective standards for imposing the death penalty, the instructions placed a thumb on death's side of the scale.

The Court should reverse the penalty judgment with directions to retry that part of the case.

Dated: January 31, 1994

Respectfully submitted,

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APPENDIX

RELEVANT CALIFORNIA STATUTES
(1982 versions)

Penal Code §190.1

"A case in which the death penalty may be imposed pursuant to this chapter shall be tried in separate phases as follows:

"(a) The question of the defendant's guilt shall first be determined. If the trier of fact finds the defendant guilty of first degree murder, it shall at the same time determine the truth of all special circumstances charged as enumerated in Section 190.2 except for a special circumstance charged pursuant to paragraph (2) of subdivision (a) of Section 190.2 where it is alleged that the defendant had been convicted in a prior proceeding of the offense of murder in the first or second degree.

"(b) If the defendant is found guilty of first degree murder and one of the special circumstances is charged pursuant to paragraph (2) of subdivision (a) of Section 190.2 which charges that the defendant had been convicted in a prior proceeding of the offense of murder of the first or second degree, there shall thereupon be further proceedings on the question of the truth of such special circumstance.

(subdivision (c) omitted)

Penal Code §190.2

"(a) The penalty for a defendant found guilty of murder in the first degree shall be death or confinement in state prison for a term of life without the possibility of parole in any

case in which one or more of the following special circumstances has been charged and specially found under Section 190.4, to be true:

"(1) The murder was intentional and carried out for financial gain.

"(2) The defendant was previously convicted of murder in the first degree or second degree. For the purpose of this paragraph an offense committed in another jurisdiction which if committed in California would be punishable as first or second degree murder shall be deemed murder in the first or second degree.

"(3) The defendant has in this proceeding been convicted of more than one offense of murder in the first or second degree.

"(4) The murder was committed by means of a destructive device, bomb, or explosive planted, hidden or concealed in any place, area, dwelling, building or structure, and the defendant knew or reasonably should have known that his act or acts would create a great risk of death to a human being or human beings.

"(5) The murder was committed for the purpose of avoiding or preventing a lawful arrest or to perfect, or attempt to perfect an escape from lawful custody.

"(6) The murder was committed by means of a destructive device, bomb, or explosive that the defendant mailed or delivered, attempted to mail or deliver, or cause [sic] to be mailed or delivered and the defendant knew or reasonably should have known that his act or acts would create a great risk of death to a human being or human beings.

"(7) The victim was a peace officer as defined in Section 830.1, 830.2, 830.3, 830.31, 830.35, 830.36, 830.4, 830.5, 830.5a, 830.6, 830.10 830.11 or 830.12, who, while engaged in the course of the performance of his duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was a peace officer engaged in the performance of his duties; or the victim was a peace officer as defined in the above enumerated sections of the Penal Code, or a former peace officer under any of such sections, and was intentionally killed in retaliation for the performance of his official duties.

"(8) The victim was a federal law enforcement officer or agent, who, while engaged in the course of the performance of his duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was a federal law enforcement officer or agent, engaged in the performance of his duties; or the victim was a federal law enforcement officer or agent, and was intentionally killed in retaliation for the performance of his official duties.

"(9) The victim was a fireman as defined in Section 245.1, who while engaged in the course of the performance of his duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was a fireman engaged in the performance of his duties.

"(10) The victim was a witness to a crime who was intentionally killed for the purpose of

preventing his testimony in any criminal proceeding, and the killing was not committed during the commission, or attempted commission of a crime to which he was a witness; or the victim was a witness to a crime and was intentionally killed in retaliation for his testimony in any criminal proceeding.

"(11) The victim was a prosecutor or assistant prosecutor or a former prosecutor or assistant prosecutor of any local or state prosecutor's office in this state or any other state, or a federal prosecutor's office and the murder was carried out in retaliation for or to prevent the performance of the victim's official duties.

"(12) The victim was a judge or former judge of any court of record in the local, state or federal system in the State of California or in any other state of the United States and the murder was carried out in retaliation for or to prevent the performance of the victim's official duties.

"(13) The victim was an elected or appointed official or former official of the Federal Government, a local or State government of California, or of any local or state government of any other state in the United States and the killing was intentionally carried out in retaliation for or to prevent the performance of the victim's official duties.

"(14) The murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity, as utilized in this section, the phrase especially heinous, atrocious or cruel manifesting exceptional depravity means a conscienceless, or pitiless crime which is unnecessarily torturous to the victim.

"(15) The defendant intentionally killed the victim while lying in wait.

"(16) The victim was intentionally killed because of his race, color, religion, nationality or country of origin.

"(17) The murder was committed while the defendant was engaged in or was an accomplice in the commission of, attempted commission of, or the immediate flight after committing or attempting to commit the following felonies:

(i) Robbery in violation of Section 211.

(ii) Kidnapping in violation of Sections 207 and 209.

(iii) Rape in violation of Section 261.

(iv) Sodomy in violation of Section 286.

(v) The performance of a lewd or lascivious act upon person of a child under the age of 14 in violation of Section 288.

(vi) Oral copulation in violation of Section 288a.

(vii) Burglary in the first or second degree in violation of Section 460.

(viii) Arson in violation of Section 447.

(ix) Train wrecking in violation of Section 219.

"(18) The murder was intentional and involved the infliction of torture. For the purpose of this section torture requires proof of the infliction of extreme physical pain no matter how long its duration.

"(19) The defendant intentionally killed the victim by the administration of poison.

(b) Every person whether or not the actual killer found guilty of intentionally aiding, abetting, counseling, commanding, inducing, soliciting, requesting, or assisting any actor in the commission of murder in the first degree shall suffer death or confinement in state prison for a term of life without the possibility of parole, in any case in which one or more of the special circumstances enumerated in paragraphs (1), (3), (4), (5), (6), (7), (8), (9), (10), (11), (12), (13), (14), (15), (16), (17), (18), or (19) of subdivision (a) of this section has been charged and specially found under Section 190.4 to be true.

"The penalty shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4, and 190.5.

Penal Code §190.3

"If the defendant has been found guilty of murder in the first degree, and a special circumstance has been charged and found to be true- . . . the trier of fact shall determine whether the penalty shall be death or confinement in state prison for a term of life without the possibility of parole. In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence including, but not limited to, the nature and circumstances of the present offense, any prior felony conviction or convictions whether or not such conviction or convictions involved a crime of violence, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or

violence or which involved the express or implied threat to use force or violence, and the defendant's character, background, history, mental condition and physical condition.

* * *

"Except for evidence in proof of the offense or special circumstances which subject a defendant to the death penalty, no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time as determined by the court, prior to trial. Evidence may be introduced without such notice in rebuttal to evidence introduced by the defendant in mitigation.

"The trier of fact shall be instructed that a sentence of confinement to state prison for a term of life without the possibility of parole may in future after sentence be imposed, be commuted or modified to a sentence that includes the possibility of parole by the Governor of the State of California.

"In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:

"(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.

"(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

"(c) The presence or absence of any prior felony conviction.

"(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

"(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

"(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

"(g) Whether or not defendant acted under extreme duress or under the substantial domination of another person.

"(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects [sic] of intoxication.

"(i) The age of the defendant at the time of the crime.

"(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

"(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

"After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances the trier of fact shall impose a sentence of confinement in state prison for a term of life without the possibility of parole."

Penal Code §190.4

"(a) Whenever special circumstances as enumerated in Section 190.2 are alleged and the trier of fact finds the defendant guilty of first degree murder, the trier of fact shall also make a special finding on the truth of each alleged special circumstance. The determination of the truth of any or all of the special circumstances shall be made by the trier of fact on the evidence presented at the trial or at the hearing held pursuant to Subdivision (b) of Section 190.1.

"In case of a reasonable doubt as to whether a special circumstance is true, the defendant is entitled to a finding that is not true [sic]. The trier of fact shall make a special finding that each special circumstance charged is either true or not true. Whenever a special circumstance requires proof of the commission or attempted commission of a crime, such crime shall be charged and proved pursuant to the general law applying to the trial and conviction of the crime.

"If the defendant was convicted by the court sitting without a jury, the trier of fact shall be a jury unless a jury is waived by the defendant and by the people, in which case the trier of fact shall be the court. If the defendant was convicted by a plea of guilty, the trier of fact shall be a jury unless a jury is waived by the defendant and by the people.

"If the trier of fact finds that any one or more of the special circumstances enumerated in Section 190.2 as charged is true, there shall be a separate penalty hearing, and neither the finding that any of the remaining special circumstances charged is not true, nor if the trier of fact is a jury, the inability of the jury to agree on the issue of the truth or untruth of any of the remaining special circumstances charged, shall prevent the holding of the separate penalty hearing.

"In any case in which the defendant has been found guilty by a jury, and the jury has been unable to reach a unanimous verdict that one or more of the special circumstances charged are true, and does not reach a unanimous verdict that all the special circumstances charged are not true, the court shall dismiss the jury and shall order a new jury impaneled to try the issues, but the issue of guilt shall not be tried by such jury, nor shall such jury retry the issue of the truth of any of the special circumstances which were found by an unanimous verdict of the previous jury to be untrue. If such new jury is unable to reach the unanimous verdict that one or more of the special circumstances it is trying are true, the court shall dismiss the jury and in the court's discretion

shall either order a new jury impaneled to try the issues the previous jury was unable to reach the unanimous verdict on, or impose a punishment of confinement in state prison for a term of 25 years.

"(b) If defendant was convicted by the court sitting without a jury the trier of fact at the penalty hearing shall be a jury unless a jury is waived by the defendant and the people, in which case the trier of fact shall be the court. If the defendant was convicted by a plea of guilty, the trier of fact shall be a jury unless a jury is waived by the defendant and the people.

"If the trier of fact is a jury and has been unable to reach a unanimous verdict as to what the penalty shall be, the court shall dismiss the jury and shall order a new jury impaneled to try the issue as to what the penalty shall be. If such new jury is unable to reach a unanimous verdict as to what the penalty shall be, the court in its discretion shall either order a new jury or impose a punishment of confinement in state prison for a term of life without the possibility of parole.

"(c) If the trier of fact which convicted the defendant of a crime for which he may be subject to the death penalty was a jury, the same jury shall consider any plea of not guilty by reason of insanity pursuant to Section 1026, the truth of any special circumstances which may be alleged, and the penalty to be applied, unless for good cause shown the court discharges that jury in which case a new jury shall be drawn. The court shall state facts in support of the finding of good cause upon the record and cause them to be entered into the minutes.

"(d) In any case in which the defendant may be subject to the death penalty, evidence presented at any prior phase of the trial, including any proceeding upon a plea of not guilty by reason of insanity pursuant to Section 1026 shall be considered on any subsequent phase of the trial, if the trier of fact of the prior phase is the same trier of fact at the subsequent phase.

"(e) In every case in which the trier of fact has returned a verdict or finding imposing the death penalty, the defendant shall be deemed to have made an application for modification of such verdict or finding pursuant to subdivision 7 of Section 11. In ruling on the application, the judge shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, and shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented. The judge shall state on the record the reasons for his findings.

"The judge shall set forth the reasons for his ruling on the application and direct that they be entered on the Clerk's minutes. The denial of the modification of the death penalty verdict pursuant to subdivision (7) of Section 1181 shall be reviewed on the defendant's automatic appeal pursuant to subdivision (b) of Section 1239. The granting of the application shall be reviewed on the People's appeal pursuant to paragraph (6)."

Supreme Court, U.S.
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No. 93-5131
No. 93-5161

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1993

Paul Palalaua Tuilaepa (No. 93-5131), *Petitioner,*

v.

State of California, *Respondent.*

William Arnold Proctor (No. 93-5161), *Petitioner,*

v.

State of California, *Respondent.*

ON WRIT OF CERTIORARI TO THE
CALIFORNIA SUPREME COURT

RESPONDENT'S CONSOLIDATED BRIEF ON THE MERITS

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QUESTIONS PRESENTED

1. After death eligibility has been established by a unanimous jury verdict finding one or more valid special circumstances, are the sentencing factors listed in California Penal Code section 190.3, which assist and guide the jury in choosing between death or life imprisonment without possibility of parole, subject to the vagueness concerns of *Stringer v. Black*, 503 U.S. ___, 112 S.Ct. 1130 (1992)?

2. Once a defendant has been properly found to be eligible for the death penalty, may the jury at the penalty phase in California constitutionally consider sentencing factors which are not specifically labelled as either aggravating or mitigating?

3. Where the jury at the penalty phase has been specifically instructed to the contrary, does the prosecutor in a state capital case violate the Eighth Amendment by arguing that the absence of a mitigating factor can itself be an aggravating factor?

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STATEMENT OF THE CASE FOR PETITIONER PROCTOR

On the night of April 21, 1982, Petitioner, William Proctor, murdered 55-year-old Bonnie Stendal, a widow who taught first grade at the Burney Elementary School in Shasta County, California. Petitioner was 20 years old when he murdered Mrs. Stendal. Petitioner entered Mrs. Stendal's home in the evening and then beat, raped, tortured, and strangled her to death.

Petitioner tortured Mrs. Stendal by stabbing her repeatedly in her breasts. According to the pathologist, the curvature of some of these injuries indicated they had been inflicted slowly and deliberately. The torture occurred while Mrs. Stendal had been immobilized. Mrs. Stendal had also been severely beaten and raped more than once. Of the five injuries to her vagina, four had been made by a foreign object. Mrs. Stendal was murdered, first by nonfatal manual strangulation, later by ligature strangulation.

Petitioner then disposed of Mrs. Stendal's tightly bound body by dumping it over a cliff on a mountain road about 12 miles outside of Burney. Petitioner spent the day Mrs. Stendal's body was discovered buying concert tickets in Redding and drinking beer with a friend and two girls in a motel.

Petitioner was linked to the murder by a bloody palm print found on a magazine in Mrs. Stendal's bedroom. Petitioner's own lawyer, the public defender for Shasta County, described this palm print as "the most damning single piece of evidence I have ever seen." Proctor JA 51. The distinctive knots used to bind Mrs. Stendal were also linked to Petitioner as a result of a truck driving course he had taken.

After his arrest Petitioner told the police he had been at a friend's house on the evening of April 21. Petitioner lied to the police and told them he left his friend's house "at around 8:30, right after a baseball game came on," and that he "walked downtown" and "caught a ride home." He said he caught a ride with a guy in a Chevy pickup in front of a local market.

Petitioner also lied when he told the police he spent the remainder of the evening at home and went to bed at about 11 p.m. Petitioner told the police he got up at around 9 a.m. the next morning, and that he did not leave home until around 3:30 or 4 p.m. When the police asked Petitioner if he had gone to Mrs. Stendal's home the evening of April 21, he again lied and said he had *not* gone there.

After visiting her son in jail, Petitioner Proctor's mother told the police that Petitioner had asked her to lie and tell Detective Jarrett that he had spent the night of the murder at home. Mrs. Proctor told Petitioner

that she had already talked to Detective Jarrett and told him Petitioner had *not* spent the night at home. Petitioner then asked his mother if she would lie and tell Detective Jarrett that he had been at a party that night.

Petitioner was charged with murder, a violation of California Penal Code section 187, and with four special circumstances. One of these special circumstances alleged that the murder of Mrs. Stendal was "Especially heinous, atrocious, or cruel, manifesting exceptional depravity" (§ 190.2(a)(14)). Petitioner Proctor's motion to dismiss this special circumstance allegation was later granted.

On December 20, 1982, the jury returned a verdict convicting Petitioner of first degree murder, finding the three remaining special circumstances to each be true. Petitioner was also convicted of rape with great bodily injury and of first degree burglary with great bodily injury. A mistrial was declared when the jury was unable to reach a decision on penalty and after Petitioner sought a change of venue, the retrial of the penalty phase was moved to Sacramento County.

The prosecution called 13 witnesses, essentially the same witnesses used at the guilt trial. The defense briefly presented two witnesses, Petitioner's younger brother and his mother.

In his closing argument at the penalty trial, the prosecutor relied almost exclusively on the circumstances of Mrs. Stendal's murder to show that death was the appropriate punishment. The prosecutor spent the vast majority of his argument reviewing each of the charges, explaining the elements of each offense and of each special circumstance.

Although not required to do so under California law, the trial judge instructed the jury that they were required to use the "beyond a reasonable doubt" standard of proof before they could find any aggravating circumstance to be applicable to this case.

The prosecutor candidly acknowledged that in his view there were two mitigating circumstances in this case which included Petitioner's age [Pen. Code § 190.3(i)] and the lack of any prior violent criminal activity. Pen. Code § 190.3(b).

The prosecutor argued that the facts surrounding the torture murder special circumstance were the crux of his case that Petitioner should be sentenced to death.

The defense argued that the jury should not find the circumstances surrounding Mrs. Stendal's death to be an aggravating factor since the prosecution could not prove that she had not been killed before she was beaten, raped and tortured. Proctor JA 61-62. The defense also minimized Petitioner Proctor's three prior

felony convictions as youthful indiscretions, one involving an auto theft and the others involving the theft of beer from a pizza parlor. Proctor JA 62.

The defense responded to the prosecutor's brief argument that the jury could consider the absence of mitigation to be aggravation as to factors (d), (e), and (f) by claiming that these factors did not apply to the facts of this case and therefore could not be considered to be aggravating circumstances.

Although not required to do so by California law, the trial court at Petitioner Proctor's request, instructed the jury that:

> If a factor is not found by you to be a mitigating factor, that in and of itself does not make that factor an aggravating factor. In order for a factor to be considered an aggravating factor, you must be satisfied beyond a reasonable doubt that the factor does exist, and it is only if you determine that the factor exists beyond a reasonable doubt that you may consider the factor an aggravating factor.

Proctor JA 80.

The trial court then instructed the jury to consider, take into account and be guided by the sentencing factors, if they were applicable to this case. The court further instructed the jury that:.

> If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death. However, if you determine that the mitigating circumstances outweigh the aggravating circumstances, you shall impose a sentence of confinement in the state prison for life, without possibility of parole.

Proctor JA 79.

Although not required to do so, the trial court clarified the "shall" instruction by giving the following additional instruction at Petitioner's request:

> In considering, taking into account, and being guided by the aggravating and mitigating circumstances, you may not decide the effect of such circumstances by the simple process of counting the number of circumstances on each side. The particular weight of such opposing circumstances is not determined by the relative number, but rather by their relative convincing force on the ultimate question of punishment.

The penalty phase jury returned a verdict finding that the aggravating circumstances outweighed the mitigating ones, and that death was the appropriate punishment.

On June 28, 1983, the Sacramento County Superior Court heard, considered, and denied

Petitioner's automatic motion for modification of judgment. Pen. Code § 190.4(e). Petitioner's appeal to the California Supreme Court followed automatically. The court issued its opinion affirming the conviction and penalty on December 28, 1992. Proctor JA 95-184.

STATEMENT OF THE CASE FOR PETITIONER TUILAEPA

On October 6, 1986, Petitioner, Paul Tuilaepa, and an accomplice entered a bar in Long Beach, California. Petitioner pointed a .22-caliber rifle in the face of the bartender and screamed that he wanted money. The bartender turned over his cash to petitioner. Then, Petitioner Tuilaepa and his accomplice split up and began robbing patrons at the bar.

Petitioner Tuilaepa took one customer's money from the bar counter. He pushed another customer against a vending machine and took a wallet containing cash. He shoved a third customer, taking from him a wallet and credit cards.

Meanwhile, petitioner's accomplice took money from at least three other patrons. But, when he pushed Melvin Whiddon and demanded his wallet, Melvin Whiddon struck the accomplice and knocked him down. At that point, Petitioner Tuilaepa intervened. He walked toward the scuffle, holding his rifle waist high,

and shot Melvin Whiddon in the neck at close range. The rifle bullet pierced Melvin Whiddon's lung and an artery.

Petitioner Tuilaepa swung the rifle in the direction of Kelvin Whiddon, Melvin Whiddon's brother. Kelvin Whiddon, unarmed, made no move toward Petitioner but instead tried to shield himself behind a post. Petitioner Tuilaepa, standing six feet away, shot Kelvin Whiddon in the chest.

Petitioner then turned the rifle toward a woman in the bar. Her husband, Bruce Monroe, stood in front of her to protect her. Monroe held no weapon, and made no threats or menacing gestures. Petitioner Tuilaepa shot Monroe in the stomach. The bullet tore through his kidney, his liver, and an artery of his heart, and it lodged against his spine.

Petitioner Tuilaepa and his accomplice ran toward the rear door of the bar. Kenneth Boone was standing near the door, but he made no move to stop petitioner. Petitioner made it to the door, looked back at Boone, smiled at him, and then aimed his rifle and shot Boone in the neck. The bullet exited the side of Boone's head, and Boone fell to the floor bleeding.

Kelvin Whiddon died from the gunshot wounds inflicted on him by Petitioner Tuilaepa. Melvin Whiddon was hospitalized for ten days due to his injuries, while Kenneth Boone was hospitalized for three

days. Bruce Monroe underwent surgery. At the time of trial, the upper part of his legs were numb and he wore a colostomy bag because of his gunshot wound.

Petitioner Tuilaepa was charged with murder and one special circumstance for the killing of Kelvin Whiddon. In addition he was charged with two firearm assaults, six robberies, and one attempted robbery for his attacks on the other patrons of the bar. In August 1987, Petitioner Tuilaepa was convicted of first degree murder with a finding that the special circumstance was true. The jury also convicted on the other charged offenses.

In the penalty-phase of the trial, the prosecution offered eyewitness testimony of several crimes and misdeeds that Petitioner Tuilaepa had committed during periods of confinement, primarily with the California Youth Authority (CYA), during 1982-1987. The purpose of this evidence was to show "[t]he presence . . . of criminal activity by the defendant which involved the use of force or violence or the express or implied threat to use force or violence," a factor for the jury's consideration in determining petitioner's sentence. Calif. Pen. Code, § 190.3(b). Prior to the presentation of this testimony to the penalty-phase jury, Petitioner Tuilaepa's counsel objected that some of the incidents, as described in advance by the eyewitnesses in a preliminary hearing outside the jury's presence, did not involve criminal

threats, force, or violence. The trial court overruled Petitioner's objection.

The various eyewitnesses then testified: (1) that Petitioner Tuilaepa in 1982 had attacked another ward in a fistfight and then threatened more retaliation against him; (2) that, later in 1982, he had yelled threats to rape and to kill a female guard as she patrolled the area outside of his locked cell; (3) that, in 1984, he had violated CYA rules by possessing razor blades, some of them broken, and a set of batteries taped together in the kind of pack typically used as a weapon; (4) that, after being cited by a CYA counselor for destroying a pair of state-issue pants in 1984, he had made a face-to-face threat to burn the counselor's face; (5) that, from inside his locked cell on successive days in 1985, he had yelled sexual threats and threats to torture or kill a woman guard in the hallway outside; (6) that, at a CYA infirmary in 1986, he had kicked a handcuffed ward in the face without any provocation; and (7) that, at the time of his murder trial in this case, he had struck and taken money from another inmate in the courthouse lockup room.

In defense at the penalty-phase, Petitioner Tuilaepa's mother and sister testified about difficulties in the Tuilaepa family, about petitioner's assistance to his paralyzed brother, and about their own desires for petitioner's life to be spared. In addition, a psychologist

testified that petitioner placed in the bottom five percent of the population in verbal ability, owing to the fact that he was raised by a family that communicated primarily in Samoan, but that he scored in the normal range, with normal intellectual potential, in non-verbal ability.

Each side was allowed one argument in the penalty phase. The prosecutor, who went first, expressly addressed arguments he said he anticipated from the defense about four kinds of mitigating evidence, Tuilaepa JA 10-11: Petitioner's age, Tuilaepa JA 11-14; Petitioner's sub-normal intelligence, Tuilaepa JA 10-11; the fact that victim Whiddon had precipitated the shooting by fighting with Petitioner's accomplice, Tuilaepa JA 15-16; and sympathy for Petitioner and his family, Tuilaepa JA 17-19. The prosecutor then offered his explanations why such mitigating evidence was not persuasive on the question of penalty. On the issue of age, the prosecutor argued that, in light of his criminal history, Petitioner had developed a level of criminal sophistication rendering him older than his years and that the methodical nature of the crime showed it was not a "mere folly of youth." Tuilaepa JA 12-13. "Age," the prosecutor said, "is not an excuse": Petitioner was "old enough to be held accountable" and was a "fit subject to face the death penalty." Tuilaepa JA 13-14. Similarly, the prosecutor argued that, because Petitioner

had no organic brain damage and possessed sufficient intelligence to function in life and to understand right and wrong, "the fact of an apparent subnormal IQ carries very little weight in this analytic process." Tuilaepa JA 14-15. In advance response to the possible suggestion that the victim had provoked the attack, the prosecutor argued that Petitioner could have responded in many ways short of homicide and that, rather than blame the victim, the proper focus of the jury should be the Petitioner's conduct. Tuilaepa JA 16-17. Last, on the question of mitigating evidence, the prosecutor argued that, regardless of sympathy for Petitioner's family, Petitioner's own crime rendered him undeserving of sympathy. Tuilaepa JA 17-19.

The prosecutor next discussed, explicitly, "the evidence that was presented in aggravation." Tuilaepa JA 19. He said it fell into two categories: the circumstances of the crime, and Petitioner's prior criminal behavior. Tuilaepa JA 19. The prosecutor argued that the circumstances of the crime themselves sufficed to justify the death penalty, and he specifically cited the number of people whom petitioner shot, the nature of their wounds, and the fact that the location of the wounds Petitioner inflicted even on the surviving victims had created a high risk of death that was avoided merely by good luck. Tuilaepa JA 25-26. On the issue of Petitioner's prior criminal behavior, the

prosecutor reminded the jury about Petitioner's assaults, the robbery, his possession of weapons, and his threats of violence. Tuilaepa JA 19-24.

Defense counsel discussed the five sentencing factors about which the jurors would be instructed, stating, "Believe me, you've just got an enormous amount of discretion." Tuilaepa JA 43-44. In discussing the "first" factor, the murder itself, defense counsel argued that it was "highly important" that Petitioner had not planned or premeditated or carefully considered killing anybody, but that Petitioner instead had fired all the shots within a few seconds after the unforseen conduct of victim Whiddon in attacking the accomplice. Tuilaepa JA 45-49. On the "next factor," the prior criminal conduct, defense counsel argued that Petitioner's conduct was "pretty insignificant." Tuilaepa JA 49-50. He then pointed out that, on the "third item," Petitioner had no prior felony convictions. Tuilaepa JA 51.

On the question of age, defense counsel pointed out that Petitioner was only about fifteen years old when he uttered some of his threats to the female counselors, and he contradicted the prosecutor's argument about Petitioner being "old enough" by asserting, "The law is age, period, not whether you're old enough, but age. [¶] He's a young man and you should consider that." Tuilaepa JA 52.

The trial court did not list all of the statutory sentencing factors from Penal Code section 190.3 in its instructions. Rather, the jury was instructed in part as follows:

> In determining which penalty is to be imposed on the defendant, you shall consider all the evidence that has been received during any part of the trial in this case. [¶] You shall consider, take into account and be guided by the following factors, if applicable: [¶] A, the circumstances of the crime in which the defendant was convicted in the present proceeding and the existence of any special circumstance found to be true. [¶] B, the presence or absence of criminal activity by the defendant which involved the use of force or violence or the express or implied threat to use force or violence. [¶] C, the presence or absence of any prior felony conviction. [¶] D, the age of the defendant at the time of the crime. [¶] E, any other circumstance which extenuates the gravity it *[sic]* of the crime even though it is not a legal excuse for the crime. [¶] And any other simpathetic *[sic]* or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death whether or not related to the offense for which he is on trial.

Tuilaepa JA 60-61.

The jury was also instructed as follows with respect to its consideration of Petitioner's prior misconduct in custody:

> Evidence has been introduced for for *[sic]* the purpose of showing that the defendant Tuilaepa has committed criminal acts which involve the express or implied use of force or violence or the threat of force or violence. [¶] Before you may consider any such criminal acts as an aggravating circumstance in this case, you must first be satisfied beyond a reasonable doubt that the defendant did in fact commit such criminal acts. [¶] You may not consider any evidence of any other criminal acts as an aggrava*ing circumstance.

Tuilaepa JA 61-62.

The jury was instructed to consider, take into account, and be guided by the applicable aggravating and mitigating factors. They were further advised:

> In weighing of aggravating and mitigating circumstances does not mean *[sic]* a mere mechanical counting of factors on each side of an imaginary scale or the arbitrary assignment of weights to any of them. [¶] You are free to assign whatever moral or simpathetic *[sic]* value you deem appropriate to each and all of the

various factors you are permitted to consider. [¶] In weighing the various circumstances you simply determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. [¶] To return a judgment of death, each of you must be persuaded that the aggravating evidence is so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

Tuilaepa JA 62-63.

Petitioner Tuilaepa did not object to any of the penalty phase jury instructions.

The jury commenced deliberations at 11:35 a.m. on August 12. At 3:20 p.m. the next day, August 13, the jury sent a note reporting a deadlock after "eight and a half hours of deliberation." The court excused the jurors for the day, asking them to return to continue deliberations the next morning at 9 a.m. At 10:40 the next morning, August 14, the jury returned its verdict of death for Petitioner Tuilaepa.

Petitioner Tuilaepa's appeal to the California Supreme Court was automatic. That court affirmed the convictions and death judgment in an opinion issued on December 28, 1992.

ARGUMENT SUMMARY

Petitioners essentially ask this Court to declare California's death penalty procedures unconstitutional, with the possible reversal and retrial of more than 350 death judgments. In these cases now before this Court, it is argued that three of the sentencing factors used in California to assist juries during the penalty phase of a capital case in selecting between death and life imprisonment without parole are subject to the vagueness test which this Court applied to the Mississippi capital sentencing scheme in *Stringer v. Black*, 503 U.S. ___; 112 S.Ct. 1130 (1992).

Petitioners allege that the following three capital sentencing factors are unconstitutionally vague when used for aggravation rather than mitigation: (1) the circumstances of the offense [Pen. Code § 190.3(a)]; (2) prior criminal activity which involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence [Pen. Code § 190.3(b)]; and (3) the defendant's age [Pen. Code § 190.3(j)]. Petitioners claim that when used for aggravation rather than mitigation, these factors are so vague as to be of no benefit whatsoever in narrowing the jury's discretion and that these factors do not meaningfully assist the jury in making an individualized and rational sentencing choice. When used for

mitigation, Petitioners apparently see no vagueness in these same factors.

Falling victim to the "tyranny of labels" there is an assertion that since California refers to its capital sentencing factors as "aggravating circumstances" and because California requires penalty phase juries to "weigh" these sentencing factors, this state's sentencing procedures are identical to those of Mississippi and other weighing states. Respondent will show that such is not the case.

Although different from those in Mississippi and the other weighing states, California's capital sentencing procedures still meet the two basic constitutional requirements articulated by this Court for any capital sentencing scheme.

Thus, with respect to capital cases, this Court has consistently told the states that the Eighth Amendment imposes only two constitutional limitations on their capital sentencing procedures. First, rational criteria must be used to narrow the group of defendants eligible for the death penalty. Second, defendants facing capital sentencing must be allowed to present any relevant mitigating evidence.

Once these limitations have been met, the states have been given the option of fashioning their own individual procedures.

California has enacted statutory special circumstances which narrow the group of defendants eligible for the death penalty and California allows defendants to present their mitigating evidence at the penalty trial. Petitioners do not challenge the special circumstance findings utilized in California to narrow the group of defendants eligible for the death penalty. Instead, it is claimed that this Court's decision in *Stringer* holds that the Eight Amendment requires a second round of narrowing, which allegedly must take place at the sentencing phase.

In the Mississippi death penalty procedures which were reviewed in this Court's decision in *Stringer*, the aggravating circumstances used at the sentencing phase simultaneously performed two entirely different functions. The first of these two-fold functions is that of narrowing the class of death-eligible defendants and the second is that of assisting the sentencer in determining whether death is appropriate for the particular defendant.

To the extent that Mississippi's aggravating circumstances are used in this dual capacity, they were found to be subject to the Eighth Amendment's vagueness test.

The California Supreme Court has recently rejected the claim that the concerns expressed in *Stringer* are applicable to California's death penalty statute.

Simply put, a sentencing factor which does not perform a narrowing function, but is instead used exclusively to assist the jury in the selection of the appropriate penalty for a particular defendant, is not subject to this Court's traditional Eighth Amendment vagueness analysis. Under these circumstances, a second round of narrowing is not constitutionally mandated.

In its decision following remand from this Court, the majority opinion of the California Supreme Court found that while the traditional Eighth Amendment vagueness test did not apply to California, the sentencing factors set forth in Penal Code section 190.3 must nevertheless meet standards of specificity and relevance. The majority held in *People v. Bacigalupo*, 6 Cal.4th 457 (1993) (*Bacigalupo II*) that California's eleven capital sentencing factors "must be defined in terms sufficiently clear and specific that jurors can understand their meaning, and they must direct the sentencer to evidence relevant to and appropriate for the penalty determination."

It is respondent's position that even these standards are not constitutionally mandated where a state capital sentencing statute satisfies the traditional two part test of first narrowing the class of those who are death eligible and second, allows the defendant to present mitigating evidence on whether death is the appropriate punishment. *See Bacigalupo II, supra*, 6

Cal.4th at 479-484, 24 Cal.Rptr.2d at 822 (Panelli, J., concurring).

Petitioners are actually asking this court to drastically depart from its existing Eighth Amendment precedents. They are requesting that an entire new requirement be added to those already articulated in the cases summarized by *McClesky v. Kemp*, 481 U.S. 279 (1987). A holding by this Court that narrowing is needed not only at the capital eligible stage but also at the sentencing stage would "alter in significant fashion this Court's capital sentencing jurisprudence." *Johnson v. Texas*, ___ U.S. ___, 113 S.Ct. 2658, 2671 (1993). Such an expansion of the Eighth Amendment would work a substantial injustice on those states which have justifiably relied on this Court's previous pronouncements as to the minimum requirements of the Eighth Amendment.

However, even if this Court were to review the three challenged sentencing factors for vagueness as Petitioners suggest, there is no basis for finding any of them constitutionally suspect since they each meet the dual requirements of relevance and specificity called for by the California Supreme Court. Nor have Petitioners shown that the Eighth Amendment requires that the factors set forth in Penal Code section 190.3 be individually labelled as either aggravating or mitigating.

For these reasons, Respondent asks this Court to deny Petitioners' request for relief.

ARGUMENT

I.

THE SENTENCING FACTORS USED IN CALIFORNIA TO ASSIST JURIES DURING THE PENALTY PHASE IN SELECTING THE APPROPRIATE PUNISHMENT IN A CAPITAL CASE ARE NOT SUBJECT TO THIS COURT'S EIGHTH AMENDMENT VAGUENESS ANALYSIS

Petitioners jointly argue that the vagueness test employed in *Stringer* and in this Court's earlier Eighth Amendment cases must be applied to at least three of the eleven sentencing factors[1/] used in California by

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1. Penal Code section 190.3 specifies that the factors which the jury shall take into account in selecting the appropriate penalty in a capital case are:

(a) The circumstances of the crime. . . .

(b) The presence or absence of criminal activity . . . which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

(c) The presence or absence of any prior felony conviction.

(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(e) Whether or not the victim was a participant. . . .

(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a morel justification or extenuation for his conduct.

(g) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.

(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired

juries deciding the appropriate penalty in capital cases. Respondent disagrees as did the California Supreme Court when it recently considered and rejected the identical claim. *See People v. Bacigalupo*, 6 Cal.4th 457 (1993).

Specifically, Petitioners allege that the following three factors which juries may consider in deciding the appropriate punishment in a capital case are unconstitutionally vague when used as an aggravating rather than mitigating circumstance: (1) the circumstances of the offense [Pen. Code § 190.3(a)]; (2) prior criminal activity which involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence [Pen. Code § 190.3(b)]; and (3) the Defendant's age [Pen. Code § 190.3(i)]. Petitioners claim that when used as an aggravating rather than mitigating circumstance, these factors are so vague as to be of no benefit whatsoever in narrowing the jury's discretion and that these factors do not assist the jury in making an individualized and rational sentencing choice. Petitioners claim this

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as a result of mental disease or defect, or the effects of intoxication.

(i) The age of the defendant at the time of the crime.

(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

vagueness is so pernicious that it also prevents meaningful review by the trial court at the modification hearing and that it also prevents meaningful appellate review by the California Supreme Court. In short, Petitioners claim that any capital judgment in which aggravating evidence was used pursuant to any of these factors must automatically be reversed. However, Petitioners apparently find no constitutional vagueness problems when this same type evidence is used as a mitigating circumstance.

Petitioner Proctor challenges only factor (a) while Petitioner Tuilaepa challenges all three factors. In the case of Petitioner Proctor, the prosecutor acknowledged that age could be considered by the jury as a mitigating circumstance in selecting the appropriate punishment and no factor (b) evidence was introduced at the penalty phase retrial in petitioner Proctor's case.

In Petitioner Tuilaepa's case, the prosecutor merely argued against considering the defendant's age as a mitigating factor and did not affirmatively claim that age was an aggravating factor. The prosecutor in the Tuilaepa case did argue that there was evidence which established that both factors (a) and (b) were aggravating rather than mitigating circumstances.

Citing to this Court's opinion in *Stringer v. Black*, 503 U.S. ___, 117 L.Ed.2d 367 (1992), Petitioners claim these three sentencing factors, when used to show

aggravation, are deficient in that (1) the term "circumstances of the crime" under factor (a) is allegedly vague in regard to which facts of the case weigh in favor of death and that this factor provides no guidance to the jury in making its sentencing choice; (2) factor (b) is allegedly vague because the jury is not told which crimes qualify as aggravators and what the elements of these crimes are; and (3) factor (i) is supposedly vague because the jury is provided no guidance on how to determine how a defendant's chronological age mitigates or aggravates the charged offenses. In addition, Petitioner Proctor argues that factors (d), (e), and (f) are also vague because the prosecutor was allowed to argue that the absence of mitigating evidence permitted the jury to consider these as aggravating factors. Finally, Petitioner Proctor argues that factors (d), (e), (f), (g), (h), and (j) are vague because the jury is not told whether they are aggravating or mitigating, if present.

As will be shown, Petitioners' attempt to establish the vagueness of these sentencing factors under *Stringer v. Black* is misplaced, as the California capital punishment scheme fully comports with this Court's well-established death penalty jurisprudence.

The constitutional requirements which a state must satisfy before imposing a death sentence were

succinctly summarized by this Court in *McCleskey v. Kemp*, 481 U.S. 279, 305-306 (1987):

> In sum, our decisions since *Furman* [v. *Georgia* (1972) 408 U.S. 238] have identified a constitutionally permissible range of discretion in imposing the death penalty. First, there is a required threshold below which the death penalty rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold. Moreover, a societal consensus that the death penalty is disproportionate to a particular offense prevents a State from imposing the death penalty for that offense. Second, States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty. In this respect, the State cannot channel the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant.

Once these two constitutionally imposed limiting principles have been satisfied, "the States enjoy their traditional latitude to prescribe the method by which those who commit murder shall be punished." *Blystone v. Pennsylvania*, 494 U.S. 299, 309 (1990).

While the Eighth Amendment clearly requires that the class of death-eligible defendants be narrowed,

this Court has consistently held that it is also the rule that there is no exclusive "right way for a State to set up its capital sentencing scheme." *Spaziano v. Florida*, 468 U.S. 447, 464 (1984). Thus, this Court has found that the narrowing function may take place at either the guilt of penalty phase of a capital case. *Lowenfield v. Phelps*, 484 U.S. 231, 244-245 (1988). In many states the jury's discretion is channeled through the use of aggravating circumstances (referred to as special circumstances in California), one or more of which must be found true before a defendant is eligible for the death penalty. The use of such aggravating or special circumstances is not, however, "an end in itself" (*Lowenfield, supra,* at p. 244), and "the Eighth Amendment does not require that these aggravating circumstances be further refined or weighed by a jury." *Blystone, supra,* at p. 298.

For those states which employ them as part of the constitutionally required narrowing function, aggravating circumstances must "furnish principled guidance for the choice between death and a lesser penalty. *Richmond v. Lewis*, 506 U.S. ___, 121 L.Ed.2d 411; 113 S.Ct. 528, 534 (1992). That is, the circumstance must "genuinely narrow the class of persons" eligible for death and must "reasonably justify" the death penalty" on the defendant as compared to other convicted murderers. *Zant v. Stephens*, 462 U.S.

862, 877 (1993). An aggravating circumstance which a "person of ordinary sensibility" could find applicable to any murder will not suffice. *Godfrey v. Georgia*, 446 U.S. 420, 428-429 (1980) [absent some judicial limitation, an outrageously or wantonly vile, horrible, and inhuman aggravating factor did not adequately limit the jury's discretion].)

Claims that a particular aggravating or special circumstance is vague "are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in *Furman [,supra]*." *Maynard v. Cartwright*, 486 U.S. 356, 361-362 (1988). This court in *Maynard* expressly distinguished its review of statutory narrowing factors from claims of vagueness based on lack of notice under the Due Process Clause. In the latter case, statutes are assessed on an "as-applied basis" and the due process challenge may be overcome where "reasonable persons would know that their conduct is at risk." *Id.*, at p. 361. Thus, one who challenges an aggravating or special circumstance on Eighth Amendment grounds does not so much allege that the average juror would fail to understand the terms used, as they complain that any understanding based on the generally accepted meaning

of those terms would provide no guidance in channeling the jury's discretion *during the critical narrowing process.*

This Court's well established Eighth Amendment jurisprudence also amply demonstrates that the primary constitutional concern is with the procedure by which the state imposes a death sentence rather than with the substantive factors considered by the sentencer once the defendant is found to be within the class of persons eligible for the death penalty. *California v. Ramos*, 463 U.S. 992, 999 (1983). After the jury's discretion has been adequately channeled by narrowing the class of death-eligible defendants, this Court has allowed the states to permit juries to consider "a myriad of factors to determine whether death is the appropriate punishment." *Id.*, at p. 1008. The jury may, at that point, "exercise unbridled discretion" in reaching its sentencing verdict. *Zant v. Stephens*, *supra*, 462 U.S. at p. 875.

With the above principles in mind, *Stringer* and its application, if any, to California's death penalty law will be examined.

In *Stringer*, this Court reviewed a Mississippi death judgment. As explained in the opinion, a Mississippi defendant who is convicted of a capital murder -- in that case a killing during a robbery or

burglary -- proceeds to a sentencing phase.[2] If the jury returns a finding at the sentencing phase that at least one of eight statutory aggravating circumstances is true, it must then determine whether there are any mitigating circumstances which outweigh the aggravation before it may impose a death sentence. 112 S.Ct. at p. 1134. Thus, as interpreted by the Mississippi Supreme Court, *see Stringer, supra* at 1138-1139, an aggravating factor in Mississippi simultaneous performs two entirely different functions. The first of these two distinct functions is that of narrowing the class of death-eligible defendants and the second is that of assisting the sentencer in determining whether death is appropriate for the particular defendant. Indeed, the jury's finding of an aggravating circumstance effectively requires the defendant to present evidence of mitigation sufficient to overcome the aggravation. *Cf. Walton v. Arizona*, 497 U.S. 639, 643-644 (1990); 110 S.Ct. 3047 [placing burden on defendant to present mitigation sufficient to overcome aggravation does not violate the Constitution].)

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2. Under Mississippi law a finding of "capital murder" is not designed to channel juror discretion, but is a necessary prerequisite to a sentencing hearing in the same way that a California jury must find first degree murder before the defendant is death-eligible. See Miss. Code, Ann. §§ 97-3-19; 97-3-21; see also *Cabana v. Bullock*, 474 U.S. 376, 385 (1986) [discussing "capital murder" under Mississippi law].

Stringer's jury found three aggravating circumstances. Although the Mississippi Supreme Court upheld all of them in affirming the judgment, subsequent United States Supreme Court decisions (see *Clemons v. Mississippi*, 494 U.S. 738 (1990) concluded that the "heinous, atrocious or cruel" circumstance was unconstitutionally vague. Given the significance the Mississippi court has attached to aggravating circumstances during the weighing phase of a capital sentencing hearing, this Court found that the use of "a vague or imprecise" factor "at the very least requires constitutional harmless-error analysis or reweighing in the state judicial system." 112 S.Ct. at p. 1140. The reviewing court in a "weighing state"[3/] may not simply assume that an invalid aggravating factor did not infect the weighing process. *Id.*, at p. 1137. Such analysis is particularly important under a statute like Mississippi's where the invalid aggravating factor first narrows the class and then effectively creates a presumption of death

3. While it is true that California requires juries to weigh aggravating and mitigating factors during the penalty phase, it is not clear that this process makes California a weighing state within the meaning of the this Court's Eighth Amendment cases. In *Stringer* the court focused on the fact that the sentencing authority must first find an aggravating circumstance, which narrows the death-eligible class, and then weigh against that finding any mitigation. See also *Richmond v. Lewis*, *supra*, 121 L.Ed.2d 411; 113 S.Ct. at p. 534 [characterizing Arizona as a weighing state]. This is entirely unlike California's procedure, as explained further below.

unless outweighed by any mitigating evidence. *Id.*, at p. 1139. This Court also observed in *Stringer* that "a vague aggravating factor used in the weighing process . . . creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance." *Ibid.* When considered in its proper context, respondent submits that the concern expressed in *Stringer* has no applicability to California's death penalty statute. Simply put, a sentencing factor which does not perform a narrowing function, but is used exclusively to assist the jury in the selection of the appropriate penalty for a particular defendant, is not subject to this Court's traditional Eighth Amendment vagueness analysis.

This was the precise holding of the California Supreme Court when it recently decided *People v. Bacigalupo*, 6 Cal.4th 457 (1993), on remand from this Court's order in *Bacigalupo v. California*, 506 U.S. ___, 121 L.Ed.2d 5; 113 S.Ct. 32 (1992).

In *Bacigalupo II* the California Supreme Court interpreted its own state law as falling outside this Court's Eighth Amendment concerns expressed in *Stringer*. This Court has noted that a state Supreme Court's interpretation of the meaning of its state's death penalty law can alone be dispositive. *Stringer*, 117 L.Ed.2d at 381. The California Supreme Court has

concluded that this Court's Eighth Amendment vagueness concerns expressed in *Stringer* have no application to the sentencing factors set forth in California Penal Code section 190.3 since these factors are only considered by the sentencer after the defendant has been found beyond a reasonable doubt to have come within the legislatively defined category of persons eligible for the death penalty. *Bacigalupo II*, 6 Cal.4th at 474-478 (majority opinion), at 480 (concurring opinion of Justice Panelli) 24 Cal.Rptr.2 at 818-820; at 822.

Neither Petitioner attacks the "vagueness" of the special circumstances which made them eligible for the death penalty in California. Instead, they merely seek to apply the vagueness test to the sentencing factors of California Penal Code section 190.3 which assist the jury in determining who among those eligible for capital punishment should actually be put to death.

In *Stringer*, Mississippi sought to establish that its system could be equated with the scheme in Louisiana which had survived constitutional challenge in 1988. In Louisiana, however, the narrowing of the death-eligible class occurs with the finding of capital murder in the guilt phase, after which the jury must find at least one aggravating circumstance, but is not required to weigh aggravating versus mitigating factors in order to return a verdict of death. This Court upheld the Louisiana scheme, finding its use of aggravating circumstances was

not comparable to their use in other states, such as Florida, i.e., so called "weighing" states. *Lowenfield v. Phelps*, 484 U.S. 231, 244-245, 98 L.Ed.2d 568, 108 S.Ct. 546 (1988); compare *Socher v. Florida*, 504 U.S. ___, 119 L.Ed.2d 326; 112 S.Ct. 2114 (1992) and *Espinosa v. Florida*, 505 U.S. ___, 120 L.Ed.2d 854; 112 S.Ct. 2926 (1992).

It was argued by the state in *Stringer* that since Mississippi narrowed the death-eligible class in the guilt phase by requesting the jury to first convict the defendant of capital murder, the use of aggravating factors in Mississippi had no constitutional significance. The Mississippi Supreme Court had, however, stated in no uncertain terms that its "sentencing scheme operates in the same manner as the Florida system." *Stringer*, 117 L.Ed.2d at 381. The Mississippi statute was also interpreted by the United States Supreme Court in light of *Godfrey v. Georgia*, 446 U.S. 420, 64 L.Ed.2d 398, 100 S.Ct. 1759 (1980) and *Maynard v. Cartwright*, 486 U.S. 356, 361-362; 100 L.Ed.2d 372; 108 S.Ct. 1853 (1988), which dealt with the adequacy of state aggravating circumstances to channel the sentencer's discretion by narrowing the death-eligible class. *See also Shell v. Mississippi*, 498 U.S. ___, 112 L.Ed.2d 1; 111 S.Ct. 313 (1990) reversing because of inadequate aggravating factors, citing *Maynard* and *Godfrey*.

In contrast to the situation presented in *Stringer*, neither this Court, nor the California Supreme Court has held that the sentence selection part of California's death penalty scheme operates in precisely the same manner as another state wherein aggravating factors have been held to have constitutional significance.[4/]

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4. Petitioners and amicus curiae suggest that this Court's denial of certiorari in *Pensinger v. California*, ___ U.S. ___ 116 L.Ed.290; 112 S.Ct. 357 (1991) reh. den. 112 S.Ct.923 indicates that at least two justices of this Court have found that California and Mississippi are both weighing states. Petitioners' reliance on *Pensinger* is misplaced. In *Pensinger* the defendant had been convicted of two special circumstances, one of which was later found to be invalid. Justice O'Connor noted that in California at the penalty phase, the trier of fact weighs any aggravating circumstances, including the special circumstances found to be true, against any mitigating circumstances. The California Supreme Court had found the torture murder special circumstance to be invalid because of an instructional error dealing with the requisite intent. *See People v. Pensinger*, 52 Cal.3d 1210; 278 Cal.Rptr. 640 (1991). The California Supreme Court had rejected a harmless error claim as to the validity of this special circumstance but nevertheless affirmed the conviction, because there was still one other valid special circumstance in the case.

As the dissent from the denial or certiorari notes in *Pensinger* the penalty phase jury in California may consider "any special circumstances found to be true" as an aggravating factor under Penal Code section 190.3(a). The California Supreme Court emphasized, however, that it was the *facts* relating to torture, rather than the statutory label of "special circumstance," which was of significance to the jury in its penalty deliberations. 52 Cal.3d at 1271-1272, 278 Cal.Rptr. at 674. This is completely unlike the Mississippi statutory scheme where the aggravating factor itself is significant to the penalty determination. For these reasons Petitioners are mistaken in their attempt to rely on the denial of certiorari in *Pensinger v. California, supra,* to support this claim that California and Mississippi are, or have been held

Most recently, in *Bacigalupo II*, the California Supreme Court explained that the factors set forth in section 190.3 are only considered by the sentencer after the defendant has been found death eligible under other provisions of the California Penal Code which are not being constitutionally attacked. *Bacigalupo II*, 6 Cal.4th at 475-477, 24 Cal.Rptr.2 at 819-820.

In *Bacigalupo II*, the California Supreme Court did not stop at holding that *Stringer* does not apply to California's sentencing factors but instead went on to find that the Eighth Amendment nevertheless imposes a lesser standard on factors used exclusively to assist the jury in a capital case to decide upon the appropriate punishment. In this regard the California Supreme Court held that:

> Any meaningful assessment of the moral culpability of a defendant convicted of the crime of capital murder will invariably include some facts about the offense and the offender that will weigh in the sentencing decision in favor of the more severe penalty of death. The section 190.3 "aggravating" factors in California's capital scheme do no more than direct attention to such facts. Because they do not perform a "narrowing" function, they are not subject to the standard that

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to be, "weighing" states for *Stringer* purposes.

the United States Supreme Court articulated in *Godfrey v. Georgia, supra*, 446 U.S. 420, and in *Maynard v. Cartwright, supra*, 486 U.S. 356.

We do not, however, suggest that the Eighth Amendment imposes no standards whatsoever on those sentencing factors in section 190.3 of our 1978 death penalty law that can serve to aggravate penalty. As we explained in *People v. Tuilaepa, supra*, 4 Cal.4th at p. 595, these factors must meet the dual standards of "specificity" and of "relevance." *They must be defined in terms sufficiently clear and specific that jurors can understand their meaning, and they must direct the sentencer to evidence relevant to and appropriate for the penalty determination.*[5]

6 Cal.4th at 477, 24 Cal.Rptr.2d at 820 (emphasis added).

Contrary to Petitioners' assertion, the California Supreme Court's decision in *Bacigalupo II* is entirely

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5. Respondent does not endorse the portion of the majority opinion of the California Supreme Court which holds that the so-called "dual standards" test is required by the Eighth Amendment. Instead, Respondent agrees with the concurring opinion by Justice Panelli which finds that such a standard is not constitutionally mandated where a state capital sentencing statute satisfies the traditional two part test of first narrowing the class of those who are death eligible and second, allows the defendant to present mitigating evidence on whether death is the appropriate punishment. *See Bacigalupo II, supra*, 6 Cal.4th at 479-484, 24 Cal.Rptr.2d at 821-825 (Panelli, J., concurring).

consistent with the previous decisions of that court and offered no new or shocking interpretation of California's death penalty statutes. In contrast to the capital sentencing schemes in other states, before a California defendant is eligible for death, there must be a conviction of first degree murder *and* at least one special circumstance must be found true beyond a reasonable doubt. Pen. Code, § 190.1. "A single valid special circumstance finding is sufficient to determine that defendant is eligible for the death penalty." *People v. Bittaker*, 48 Cal.3d 1046, 1102; 259 Cal.Rptr. 630, 662 (1989). This provision adequately "limits the death sentence to a small subclass of capital-eligible cases." *Pulley v. Harris*, 465 U.S. 37, 53 (1984).

At the penalty phase the jury takes into account any of eleven statutory factors, if relevant, as well as any non-statutory mitigating evidence presented by the defendant. Pen. Code, § 190.3. If the jury concludes that the aggravating factors outweigh the mitigating factors, it returns a sentence of death. If it finds that mitigation outweighs aggravation, it returns a sentence of life in prison without parole. Pen. Code, § 190.3. There is no presumption that death is appropriate at the sentencing phase in California, *People v. Andrews*, 49 Cal.3d 200, 230; 260 Cal.Rptr. 583, 603 (1989), and apart from the requirement that the state prove prior uncharged criminal activity beyond a reasonable doubt,

People v. Robertson, 33 Cal.3d 21, 53; 188 Cal.Rptr. 77, 96 (1982), neither side has any burden of proof with respect to aggravation,[6] mitigation, or the appropriateness of death. *People v. Frierson*, 25 Cal.3d 142, 180, 158 Cal.Rptr. 281, 303 (1979).

Unlike Mississippi's aggravating circumstances which alone authorize death unless a jury finds that any mitigation outweighs them, a special circumstance finding in California in and of itself creates no presumption that death is appropriate.[7] To be sure, under California's statute the sentencing jury must consider the circumstances of the present crime and any special circumstances found to be true under section 190.3, subdivision (a), but California special

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6. Although not required to do so, the trial judge in Petitioner Proctor's case allowed the jury to impose a greater burden on the prosecution by instructing the jury that before it could consider "any fact as an aggravating circumstance" it had to "find that that fact has been established by evidence beyond a reasonable doubt." Proctor JA 79. The jury was also specifically instructed that the reasonable doubt standard applied to the three special circumstance findings and that the penalty phase jury had to make a *de novo* finding of the truth of each special circumstance before "you may determine whether or not the crimes and circumstances thereof constitute an aggravating factor."

7. California's special circumstances are, of course, subject to Eighth Amendment vagueness analysis. *See, e.g., People v. Davenport*, 41 Cal.3d 247, 260-271, 221 Cal.Rptr. 794, 801-810 (1985) (torture special circumstance); *People v. Edelbacher*, 47 Cal.3d 983, 1025; 254 Cal.Rptr. 586, 611-612 (1989) (financial gain special circumstance).

circumstances do not supply the sole basis for (or even a presumption in favor of) justifying a death sentence. By contrast, the Mississippi aggravating circumstances, which narrow the jury's discretion for *Furman* purposes (*Furman v. Georgia,* 408 U.S. 238 (1972), are also the *only* aggravating factors the jury may consider in determining whether death is appropriate. *See* Miss. Code Ann., § 99-19-101(5).

In this regard, the California Supreme Court has held that it is the *facts* underlying the special circumstances, as opposed to the finding that they are true, which is of particular significance to the penalty jury under the California sentencing scheme. *See, e.g., People v. Silva*, 45 Cal.3d 604, 632-636; 247 Cal.Rptr. 573; 588-590 (1988) (jury not misled by consideration of three improper special circumstances). Thus, because they are but one part of the factors upon which a jury may base its death verdict, special circumstances have a substantially different role and perform a far different function under California's statutory scheme from those of Mississippi's aggravating circumstances which were at issue in *Stringer*.

Petitioners and their amicus, the California Appellate Project [CAP], fall victim to the "tyranny of labels," *Snyder v. Massachusetts*, 291 U.S. 97, 114 (1934), by assuming that because California refers to its capital sentencing criteria as "aggravating factors," they must be

the same as "aggravating circumstances" in other states. Similarly, they conclude that because California requires the jury to "weigh" the aggravating and mitigating factors, it must invoke the same process applicable in other states which describe their sentencing procedure in similar terms. As this Court has observed, there is no "right way for a State to set up its capital sentencing scheme." *Spaziano v. Florida, supra*, at 464. It is thus necessary to examine each statute in its own context to determine the role and constitutional implications of its various sentencing procedures.

The determination that death is the appropriate punishment "is a moral inquiry into the culpability of the defendants." *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring). It is simply not possible to translate the concerns relating to an unwarranted conviction or an inadequate narrowing of the death-eligible class into the process by which the jury determines the appropriate punishment for a death-eligible defendant. *See California v. Ramos, supra*, 463 U.S. at 1009. By focusing attention on aggravation that includes matters "not directly related to the crime," *Boyde v. California*, 494 U.S. 370, 378 (1990) (referring to § 190.3(b)), and identifying various mitigating considerations, the list of relevant sentencing factors set forth in California Penal Code section 190.3 provides guidance to the jury and lessens the chance of an

arbitrary application of the death penalty. *Pulley v. Harris, supra,* 465 U.S. at 53. Nothing more has previously been required by the Constitution.

Petitioners are actually asking this Court to drastically depart from its existing Eighth Amendment precedents. They are requesting that an entire new requirement be added to those already articulated in the cases summarized by *McClesky v. Kemp*. A holding by this Court that narrowing is needed not only at the capital eligible stage but also at the sentencing stage would "alter in significant fashion this Court's capital sentencing jurisprudence." *Johnson v. Texas*, ___ U.S. ___, 113 S.Ct. 2658, 2671 (1993). Such an expansion of the Eighth Amendment would not bode well for those states which have justifiably relied on this Court's previous pronouncements as to the minimum requirements of the Eighth Amendment.

Acknowledging the unique nature of capital punishment, and to minimize the risk of arbitrary or capricious decisions, Respondent does not contest the necessity mandated by this Court for a narrowing of the class of those who are eligible for the death penalty. The two cases presently before the Court raise the issue of whether the Eighth Amendment requires yet another level of narrowing.

The objective of the sentencing hearing in a capital case "is an individualized determination on the

basis of the character of the individual and the circumstances of the crime." *Zant v. Stephens, supra*, 462 U.S. at 879. It would seem that the jury is in the best position to meet this objective if it is allowed to receive and consider all of the relevant evidence available on this question, not just the unrestricted mitigating evidence offered by the defendant. One of the time honored principles of our judicial system holds that the adversarial system provides the best opportunity for insuring that a jury receives all of the relevant evidence pertaining to a contested factual question.

In its amicus brief CAP sets forth numerous examples of the different ways in which California's statutory sentencing factors have been argued. This, according to amicus, demonstrates that the provisions of Penal Code section 190.3 are vague. Apart from this Court's refusal to base constitutional interpretation on a comparative analysis of state court cases, *see Arave v. Creech*, 507 U.S. ___, 113 S.Ct. 1534, 1543-1544 (1993), or the arguments presented by prosecutors in other cases, *see Boyde v. California, supra,* 494 U.S. at 386 n. 6, the examples set forth by CAP support Respondent's rather than Petitioners' argument. That the various factors in section 190.3 can be interpreted in a variety of ways simply demonstrates their use as sentencing considerations to be applied in light of the specific defendant and circumstances of each capital case. Far

from injecting randomness into the process the general criteria assure that the jury will focus on the evidence for and against death which will most accurately assist the jury in its determination of the appropriate penalty for *that case*.

It is clear that the Eighth Amendment concerns articulated by this Court in *Stringer* with respect to aggravating factors which both narrow and determine, if not presume, death are *not* present anywhere in the California scheme. This Court's concern regarding the state's use of a vague aggravating factor in the weighing process, 112 S.Ct. at 1139, simply emphasizes the point that where a jury's discretion has not been fully narrowed during the course of the trial because of an inadequate aggravating factor, the mandate of *Furman* is not satisfied by weighing any mitigation against the questionable aggravating factor during the penalty phase.

Further, any claim that the sentencing factors listed in Penal Code section 190.3 are subject to independent vagueness analysis was impliedly rejected in *Zant v. Stephens*, *supra*. In *Zant*, the Georgia Supreme Court held that "a substantial history of serious assaultive criminal convictions" (one of the three aggravating factors used to narrow the death-eligible class in Stephens' case) was unconstitutionally vague. That is, it did not provide an adequate basis for distinguishing those murderers for whom death, in

general, would be appropriate, from those for whom it would not.[8/] This Court later found, however, that the same evidence of prior criminal conduct was constitutionally admissible at the sentencing phase as a basis for imposing the death sentence, regardless of the labels attached by the jury to that conduct. 462 U.S. at pp. 887-891. Indeed, the Constitution does not prohibit consideration of the defendant's criminal record, even as non-statutory aggravation, *Barclay v. Florida*, 463 U.S. 939, 956 (1983), because it is the type of information specific to the individual defendant which will assist the jury in determining whether death is appropriate for that particular member of the narrowed class. Thus, *Zant* clearly stands for the proposition that a factor which may be defective for purposes of narrowing the class of death-eligible defendants may nevertheless be constitutionally considered by a jury at the penalty phase in deciding whether to impose death on a defendant otherwise determined to be eligible for that penalty.

In light of this Court's holding in *Zant*, California's sentencing factors in section 190.3 are not subject to an Eighth Amendment vagueness analysis. California's special circumstances adequately narrow the death-eligible class, while the statutory sentencing factors

8. That court also upheld Stephens' death penalty because the other two ruled aggravating factors adequately supported the sentence. 462 U.S. at 867-868.

merely provide guidance to the jury regarding the type of information it should consider in determining the appropriate penalty. To the extent that a vagueness challenge can be mounted, it is limited to due process concerns about lack of notice and must be considered in light of each specific case. *Maynard v. Cartwright, supra*, 486 U.S. at 361.

Moreover, this Court's prior decisions which have consistently accepted the validity of California's death penalty statutes cannot be easily ignored. For example, in *California v. Ramos*, *supra*, 463 U.S. 992, this Court observed that a special circumstance finding by the jury placed the defendant into a class of persons eligible for the death penalty. *Id.*, at 1008. Rejecting a claim that an instruction dealing with the governor's commutation power was improper, this Court then found that section 190.3 "ensures that the jury will have before it information regarding the individual characteristics of the defendant and his offense, including the nature and circumstances of the crime and the defendant's character, background, history, mental condition, and physical condition." *Id.*, at 1006.

This Court again examined California's death penalty laws in *Pulley v. Harris*, *supra*, 465 U.S. 37. After summarizing the 1977 statute -- which for purposes of this argument is identical to the 1978 scheme under which Petitioners were prosecuted -- the

court concluded that California's procedure "cannot be successfully challenged under *Furman*, and our subsequent cases." *Id.*, at 51-53. The Court noted that the special circumstances adequately limited the subclass of death-eligible defendants, while the provisions of section 190.3 guided the jury's discretion in its deliberations. *Id.*, at 53.[9]

In *California v. Brown*, *supra*, 479 U.S. 538, 540, fn *, this Court expressly noted its "approval of [California's] statutory scheme" in *Ramos* and *Harris*. Given California's justifiable reliance on those decisions, and the failure to demonstrate that they "were themselves a misinterpretation of some constitutional command," Petitioners' effort to effectively eviscerate this Court's prior approval of the state death penalty scheme should be rejected. *Johnson v. Texas*, *supra*, 113 S.Ct. at 2668.

In none of the cases did this Court suggest that it viewed California as a "weighing state." Yet it was that description of the Mississippi process which compelled the reversal in *Stringer*. 112 S.Ct. at 1137; *see also Clemons v. Mississippi*, *supra*, 494 U.S. at 745 (describing Mississippi as a weighing state.) This Court

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9. Although California provides such guidance to the jury, it is under no constitutional duty to do so. *Zant v. Stephens*, *supra*, 462 U.S. at 875; *California v. Ramos*, *supra*, 463 U.S. at 1008 n. 22.

has described a "weighing state" as one in which the "death penalty may be imposed only where specified aggravating circumstances outweigh all mitigating circumstances." *Parker v. Dugger*, 498 U.S. 308 (1991). When the operation of section 190.3 as set forth above is contrasted with the procedures followed in the so-called weighing states previously identified by this Court, it is clear that California does not fit neatly into that category and that California's use of its sentencing factors differs markedly from any other state.

Although a Florida jury returns an advisory verdict, the "trial judge . . . has ultimate sentencing authority. . . ." *Parker v. Dugger*, *supra*, 498 U.S. at 310. The Florida judge must find in writing at least one statutory aggravating circumstance, then conclude that there are insufficient mitigating circumstances to outweigh the aggravation. Fla. Stat., § 921.141(3). This procedure qualifies Florida as a weighing state. *Id.*, at 738; *Socher v. Florida*, ___ U.S. ___, 112 S.Ct. 2114, 2119 (1992).

Arizona provides exclusively for judicial sentencing in capital cases. In order to impose death, the trial court must find in writing that one or more of the statutory aggravating factors is true and that there are no mitigating factors sufficiently substantial to call for leniency. The state bears the burden of proving aggravation, while the defendant has the burden with

respect to mitigation. Ariz. Rev. Stat. Ann., § 13-703; *Walton v. Arizona*, *supra*, 497 U.S. at 643-644. Arizona is a weighing state. *Richmond v. Lewis*, *supra*, ___ U.S. ___, 113 S.Ct. at 534.

Unlike each of the above statutory schemes, California allows the jury at the penalty phase to determine whether the evidence before it has shown a particular sentencing factor to be either mitigating or aggravating. The penalty phase jury is not asked to decide if a particular aggravating factor is present. Moreover, California does not require written findings by the sentencer, does not require an express finding or agreement on the aggravating or mitigating factors, and does not provide a specific standard for weighing the aggravating and mitigating factors. Rather than mandating a specific finding that at least one aggravating circumstance exists in order to justify a death sentence, California provides a list of potential sentencing considerations which assists the jury in making "its appropriateness determination during its normative weighing" of the evidence dealing with these factors. Several of these factors can only be mitigating and others including factors (a), (b), and (c) can be either aggravating or mitigating depending upon the nature and quality of the evidence. *People v. Boyde*, 46 Cal.3d 212, 254; 250 Cal.Rptr. 83, 107 (1986), affd.; *sub nom. Boyde v. California*, 494 U.S. 370 (1990).

Thus, while a California penalty phase jury "weighs" evidence indicating aggravation against evidence offered to show mitigation, its deliberative process is not confined and directed in the manner followed by "weighing" states. Not only is the limited direction provided by California's unique statutory scheme constitutional, *see, e.g.*, *Zant v. Stephens*, *supra*, 462 U.S. at 875; *California v. Ramos*, *supra*, 463 U.S. at 1008 n. 22, it precludes application of the *Stringer* vagueness analysis to the factors in section 190.3.

In their haste to argue that California's death penalty laws are similar to those of Mississippi, Petitioners bypass the significant differences which distinguish the two statutory schemes. Petitioners rely primarily upon labels and overlook the basic functional differences between the Mississippi capital punishment laws and those of California. Because the two states differ significantly in the ways that their respective death penalty statutes operate, application of the Eighth Amendment vagueness test articulated by this Court in its *Stringer* decision to California is neither factually nor constitutionally appropriate.

II.

THE THREE SPECIFIC SENTENCING FACTORS CHALLENGED BY PETITIONERS ARE NOT FACIALLY VAGUE NOR DOES THE CONSTITUTION REQUIRE THAT THEY BE CHARACTERIZED AS EITHER AGGRAVATING OR MITIGATING

Even if this Court were to review the three challenged sentencing factors for vagueness as Petitioners suggest, there is no basis for finding any of them constitutionally suspect. In *Bacigalupo II*, the California Supreme Court found under a newly created Eighth Amendment standard, that capital sentencing factors must be defined in terms sufficiently clear and specific that ordinary jurors can understand their meaning and they must direct the sentencer to evidence relevant to and appropriate for the penalty determination. 6 Cal.4th at 477; 24 Cal.Rptr.2d at 820. Whether tested under the *Bacigalupo II* standard or by traditional Fourteenth Amendment vagueness analysis, there is no basis for challenging any of the sentencing factors in section 190.3 Nor does the Eighth Amendment require that any of California's eleven sentencing factors be individually labelled as aggravating or mitigating factors.

A. "Circumstances Of The Crime" Has Already Been Held To Be A Proper Factor To Be Considered In Determining Penalty and Is Defined In Terms Which Are Both Clear And Specific

Obviously the circumstances of the crime, in and of themselves, will not satisfy the Eighth Amendment requirement of narrowing the class of death-eligible defendants. However, by the time a California jury considers evidence related to factor (a) in the penalty trial, it has already narrowed the death eligible class through a special circumstance finding and it is then "free to consider a myriad of factors to determine whether death is the appropriate punishment." *California v. Ramos*, *supra*, 463 U.S. at 1008. "The primary concern in the Eighth Amendment context had been that the sentencing decision be based on the facts and circumstances of the defendant, his background, *and his crime*." *Clemons v. Mississippi*, *supra*, 494 U.S. at 748, emphasis added. "It would be a rather strange jurisprudence," *Herrera v. Collins*, ___ U.S. ___, 113 S.Ct. 853, 863 (1993), which allowed a capital-eligible defendant to be sentenced to death without allowing the jury to fully consider whether the specific facts and circumstances of his case justified that sentence.

This Court has established the circumstances surrounding a capital offense as one of the criteria upon which the jury *should* base its penalty determination. *See, e.g., Penry v. Lynaugh*, 492 U.S. 302, 318 (1989); *Booth v. Maryland*, 482 U.S. 496, 502 (1987), overruled on other grounds, *Payne v. Tennessee*, 501 U.S. ____,

111 S.Ct. 2597 (1991); *Jurek v. Texas*, 428 U.S. 262, 274, (1976). Moreover, there is no authority stating or implying that allowing a jury to consider the "circumstances of the offense" as a sentencing factor is unconstitutionally vague. *Jurek*, at 274.

Unlike the case of *Maynard v. Cartwright*, 486 U.S. 356, upon which Petitioners rely, Petitioners were both found death eligible because of one or more valid special circumstances. In Petitioner Proctor's case there are torture murder and two felony murder special circumstances, while in Petitioner Tuilaepa's case there is a felony murder special circumstance, all of which were initially found true beyond a reasonable doubt at the guilt phase in each case. The jury was then allowed to consider *all* of the other relevant factors set forth in California Penal Code section 190.3 *in addition to* the circumstances of the crime in determining whether the appropriate punishment in each case was death or life without the possibility of parole.

Bacigalupo II held that the Penal Code section 190.3 sentencing factors must also meet the dual standards of "specificity and of relevance." 6 Cal.4th at 477; 24 Cal.Rptr.2d at 820. Citing to this Court's Eighth Amendment cases, the California Supreme Court went on to hold that:

> To meet these dual criteria, sentencing factors should not inject into the individualized sentencing determination the possibility of

> "randomness" or "bias in favor of the death penalty." (*Stringer v. Black*, *supra*, 503 U.S. ___, ___ [117 L.Ed.2d at p. 382, 112 S.Ct. 1130 at p. 1139].) Inappropriate for consideration in the sentence selection process would be any aggravating factor that was either "seriously and prejudicially misleading," or that invited "the jury to be influenced by a speculative or improper consideration []," such as the race or political beliefs of the defendant that are without any bearing on moral culpability. (*People* v. *Ramos* (1984) 37 Cal.3d 136, 153 [207 Cal.Rptr. 800, 689 P.2d 430]; *Dawson* v. *Delaware* (1992) ___ U.S. ___ [117 L.Ed.2d 309, 112 S.Ct. 1093].)

Id. at 477; 24 Cal.Rptr.2d at 820.

In applying these two standards to factor (a), the California Supreme Court specifically rejected claims that this sentencing factor: (1) contains no narrowing factor; (2) provides no objective basis for appellate review of a death judgment; or (3) is impermissibly vague under the Eighth Amendment. The court specifically held that:

> Factor (a) uses clearly understandable terms to designate for jury consideration in sentence selection "[t]he circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special

circumstances found to be true. . . ." (§ 190.3, factor (a).) In any criminal case the circumstances of the crime of which the defendant stands convicted are the single most pertinent sentencing consideration. Indeed, by directing the sentencer to consider the circumstances of the capital crime, factor (a) of section 190.3 embodies a consideration that the United States Supreme Court has identified as "'a constitutionally indispensable part of the process of inflicting the penalty of death.'" (*Johnson* v. *Texas*, *supra*, ___ U.S. ___ [125 L.Ed.2d 290, 301; 113 S.Ct. 2658, 2665]; *People* v. *Tuilaepa*, *supra*, 4 Cal.4th at p. 594; *People* v. *Proctor* (1993) 4 Cal.4th 499, 551 [15 Cal.Rptr.2d 340, 842 P.2d 1100].) Therefore, when a California jury considers the circumstances of a defendant's capital crimes for the purpose of making an individualized determination whether life without possibility of parole or death is the appropriate penalty for a defendant already determined to be within the narrowed class of death-eligible murderers, there can be no violation of the Eighth Amendment prohibition against cruel and unusual punishments.

6 Cal.4th at 478-479; 24 Cal.Rptr.2d at 820-821.

Petitioners have not argued in their brief on the merits that the three challenged Penal Code section

190.3 sentencing factors fail to meet the two standards announced in *Bacigalupo II*, although they clearly had the opportunity to do so. Since Petitioners apparently do not dispute this point, there is no basis for finding these challenged sentencing factors to be violative of the Eighth Amendment apart from Petitioners' *Stringer* claim which respondent has already addressed.

B. <u>The "Other Violent Crimes" Factor Set Forth In California Penal Code, Section 190.3, Subdivision (b), Is Both Specific And Relevant On The Punishment Question And It Was Therefore Properly Used To Determine The Appropriate Penalty For Petitioner Tuilaepa</u>

The California Supreme Court held that factor (b) directs the penalty phase jury to specific provable and commonly understood facts about the defendant in a capital crime that may bear on his moral culpability. Evidence of his criminal conduct, especially where acts of violence toward other people are involved, is of the "general type long considered by sentencing authorities" and are particularly relevant to the penalty decision. *Bacigalupo II*, 6 Cal.4th at 478, 24 Cal.Rptr.2d at 821, citing *Payne*, 111 S.Ct. 2597; *Barclay v. Florida*, 463 U.S. 939, 956 (1983).

The California Supreme Court considered the relevance of evidence showing other crimes of violence

admitted under factor (b) and found such evidence to be probative on the issue of penalty in capital cases. Thus, in *People v. Tuilaepa*, 4 Cal.4th 569, 15 Cal.Rptr.2d 382 (1992) the California Court stated:

> It is settled that the "facts and circumstances of the defendant, his background, and his crime" are relevant to the sentencing decision (*Clemons v. Mississippi* (1990) 494 U.S. 738, 748), and the State, within certain limits, has broad latitude to decide how such facts are to be presented and considered at the penalty phase. (*Payne v. Tennessee* (1991) 501 U.S. ___ [115 L.Ed.2d 720, 735]; *Boyde v. California* (1990) 494 U.S. 370, 377.) By the same token, the individualized penalty determination required by the Eighth Amendment makes inevitable application of the sentencer's own values, perceptions, and experiences to the factors the State deems properly relevant. (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 110-112).
>
> Factor (b) focuses the sentencer's attention on other crimes (i.e., punishable offenses) committed by the defendant involving his use or threatened use of force against any person. (*People v. Phillips* (1985) 41 Cal.3d 29, 72; *People v. Boyde, supra*, 38 Cal.3d 762, 776.)

Id., at pp. 594-565; 15 Cal.Rptr.2d at 397-398. Tuilaepa JA 99.

Further, under *People v. Phillips*, 41 Cal.3d 29, 72-73 n. 25, 222 Cal.Rptr. 127, 155 n. 25 (1985), Petitioner Tuilaepa could have requested that the jury consider only specific enumerated other crimes under factor (b) and/or that the jury be instructed on the elements of those crimes. There was no such request by Petitioner Tuilaepa. The California Supreme Court conscientiously and methodically reviewed each alleged incident offered as factor (b) evidence and carefully reviewed the merits of Petitioners' arguments unless the claim had been waived. It found there was "no reasonable possibility the penalty verdict would have been different absent evidence of threats and insults [made by petitioner] against CYA personnel." Tuilaepa JA 93.

With respect to Petitioner Tuilaepa's claim that he was prejudiced by the factor (b) evidence introduced as an aggravating circumstance at his penalty trial, the California Supreme Court held that:

> Our review of the record discloses convincing evidence of all criminal conduct properly admitted under factor (b) -- the fight with inmate Gages, the unprovoked assault on another ward outside the infirmary, the assault and robbery of inmate Chatters, and the possession of potentially

> dangerous weapons while in CYA custody. There is no indication that an instruction on specific crimes and elements would have changed the jury's assessment of evidence admitted under factor (b) or would have affected the outcome at trial.

Tuilaepa JA 95.

In summary, petitioner Tuilaepa has failed to establish any factual or legal support for his claim that the factor (b) evidence introduced at his penalty trial violated the Eighth Amendment.

C. <u>A Jury Considering The Sentence In A Capital Case May Properly Consider Whether The Defendant's Age Is A Mitigating Or Aggravating Factor Since This Factor Is Clear, Specific, And Relevant To The Penalty Issue</u>

Petitioner Tuilaepa claims that Penal Code section 190.3, factor (i), the defendant's age, is unconstitutionally vague as applied in his case. According to the California Supreme Court, "[f]actor (i) directs the sentencer to consider whether the defendant's age at the time of the crime gives rise to an inference about his relative youth or maturity which in 'common experience or morality . . . might reasonably inform the choice of penalty. . . .'" *People v. Tuilaepa, supra*, 4 Cal.4th at 595, 15 Cal.Rptr.2d at 397.

This factor directs the sentencer's attention "to specific, provable, and commonly understandable facts about the defendant and the capital crime that might bear on his moral culpability." *Id.*, at 595, 15 Cal.Rptr. 2d at 397; *accord People v. Noguera*, 4 Cal.4th 599, 648-649; 15 Cal.Rptr.2d 400, 429 (1992).

In the *Tuilaepa* case the prosecutor argued first and was only allowed to argue once. The format of this argument compelled the prosecutor to anticipate what the defense lawyer would later argue during his closing remarks. Since the prosecutor was not allowed to rebut the defense argument, he therefore had to try and anticipate what the defense would claim was mitigating evidence and argue against it as best he could. This is why the prosecutor argued that *if* the defense argued age was a mitigating factor, the jury should closely examine this claim. Tuilaepa JA 11. The prosecutor merely argued that by the time he committed the charged offenses petitioner Tuilaepa was "old enough" to have been incarcerated; old enough to plan and commit a robbery; and old enough to be held accountable. Tuilaepa JA 12-13. The thrust of the prosecutor's argument was that the jury could not rely on Petitioner's age to "pass this off as the mere folly of youth." Tuilaepa JA 12-13. Thus, the prosecutor did not affirmatively argue that Petitioner Tuilaepa's age was an aggravating factor but merely attempted to show

that the defendant did not deserve lenience because of his age.

In this respect it is the rule under California law that a prosecutor may argue a defendant is less deserving of leniency because of his age, as opposed to more deserving of death. *People v. Rodriguez*, 42 Cal.3d 730, 789; 230 Cal.Rptr. 667, 705 (1986). A defendant's youth has mitigating value only to the extent that his conduct is attributable to his age. *Graham v. Collins*, 950 F.2d 1009, 1231 (5th Cir. 1992) (en bank), *affd. Graham v. Collins*, ___ U.S. ___, 113 S.Ct 892, 895 (1993).

Given his history, the prosecutor's argument regarding how the penalty phase jury should treat a claim that Petitioner Tuilaepa's age was a mitigating factor did not violate the Eighth Amendment. More importantly, allowing a jury in capital case to consider age as a sentencing factor is not barred by the Eighth Amendment. *Cf. Johnson v. Texas*, *supra*, 113 S.Ct. 2658 (holding that a jury must be able to consider youth as a mitigating factor with no suggestion that evaluation of age as an aggravating factor would violate the Eighth Amendment).

D. <u>There Is No Constitutional Requirement That The Factors Set Forth In California Penal Code Section 190.3 Be Individually Labelled As Either Aggravating Or Mitigating</u>

The California Supreme Court has properly and repeatedly rejected the argument that Penal Code section 190,.3 is unconstitutionally vague because its factors are not individually labelled as either aggravating or mitigating. *See, e.g., People v. Livaditis*, 2 Cal.4th 759, 784; 9 Cal.Rptr.2d 72, 87 (1992); *People v. Medina*, 51 Cal.3d 870, 908-909; 274 Cal.Rptr. 849, 874 (1990); *People v. McLain*, 46 Cal.3d 97, 118; 249 Cal.Rptr. 630, 642 (1988); *People v. Jackson*, 28 Cal.3d 264, 316, 168 Cal.Rptr. 603, 630 (1980). The California Supreme Court recently held that "'the aggravating or mitigating nature of these various factors should be self-evident to any reasonable person within the context of each particular case.'" *People v. Zapien*, 4 Cal.4th 929, 990, 17 Cal.Rptr.2d 122, 157 (1993), quoting *Jackson*, 28 Cal.3d at 316, 168 Cal.Rptr. 603, 630. This Court has also recognized that there is no likelihood that failure to give instructions specifically identifying the mitigating factors can result in an unreliable penalty determination. See *Graham v. Collins, supra*, ____ U.S. ____, 113 S.Ct. at p. 895.

Thus, Petitioner Proctor's challenge to the vagueness of the Penal Code section 190.3 sentencing

factors for failing to label the factors must also be rejected.

III.

THE PROSECUTOR'S ARGUMENT IN PETITIONER PROCTOR'S CASE THAT THE ABSENCE OF A MITIGATING FACTOR AMOUNTS TO AN AGGRAVATING CIRCUMSTANCE DOES NOT VIOLATE THE EIGHTH AMENDMENT SINCE THE JURY WAS PROPERLY INSTRUCTED ON THIS ISSUE

Finally, Petitioner Proctor claims that he is entitled to a reversal and a new penalty trial because the prosecutor briefly argued that the absence of three mitigating factors allowed the jury to consider these factors as aggravation. Petitioner claims that when this error is combined with the instruction that the jury "shall" return death if it found that aggravation outweighed mitigation, there is an unconstitutional exacerbation of the overall vagueness of Penal Code section 190.3 sentencing factors. Respondent disagrees.

In the Proctor case, the California Supreme Court found the challenged portion of prosecutor's argument amounted to *Davenport*[10] error but also found the error was harmless since the jury had been properly instructed on this question. Proctor JA 80. Petitioner's claim that the "shall" instruction creates a

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10. *See People v. Davenport*, 41 Cal.3d 247, 288-290, 221 Cal.Rptr. 794, 821 (1985)

mandatory death penalty statute has similarly been rejected, not only by the California Supreme Court but also by this Court. *Blystone v. Pennsylvania*, *supra*, 494 U.S. 299 and *Boyde v. California*, 494 U.S. 370 (1990).

Petitioner Proctor essentially argues the prosecutor did not correctly identify aggravating and mitigating factors during his closing argument.[11/] This claim raises a question of interpretation of the California statute regarding aggravating factors, but no federal question.

Petitioner virtually ignores several crucial factual aspects of this claim. For example, it should be noted that Petitioner did not object to the prosecutor's remarks and the prosecutor's argument was made before the California Supreme Court had issued its opinion in *People v. Davenport*, finding this type of argument to be improper under state law. It is also important to note that the trial court specifically instructed the jury that the absence of mitigating evidence on a specific factor "of itself does not make that factor an aggravating factor." Proctor JA 80.

The California Supreme Court found the prosecutor's argument to be harmless error under state

11. In the California Supreme Court Petitioner Proctor merely argued that the Prosecutor committed *Davenport* error as to factors (d), (e), and (f). JA p. 144-145. Petitioner Proctor now claims for the first time that factors (h) and (j) must be added to this list.

statutes and petitioner therefore fails to establish a federal question. *Estelle v. McGuire*, ___ U.S. ___, 112 S.Ct. 475 (1991). The state court carefully and rigorously analyzed Petitioners' claim and found that it lacked merit. Proctor JA 148-153.

Petitioner Proctor also contends that the instruction that the jury "shall" impose death if aggravation outweighs mitigation and the prosecutor's argument increased the vagueness of the Penal Code section 190.3 sentencing factors. Proctor Brief at 24-25. *Boyde v. California*, *supra*, 494 U.S. 370, is dispositive of Petitioner's claim. This Court held in *Boyde* that the "unadorned" factor (k) instruction did not prevent the jury's consideration of section 190.3 mitigating evidence regarding the defendant's of background and character. *Id.*, at 381. This satisfies the constitutional requirement of individualized sentencing in capital cases. *Id.*, at 377, citing *Blystone*, 494 U.S. at 307. In context, the District Attorney's brief argument in the Proctor case that the death penalty was "necessary" or that the jury was "obligated to return a verdict of death" simply contended that the aggravating evidence was overwhelming while evidence of mitigation was insubstantial. Proctor JA 23, 32.

Petitioner has again failed to state a basis for relief.

CONCLUSION

The California Supreme Court's judgments, upholding the convictions and death sentences in both cases, should be affirmed and Petitioners' request for relief from this Court must be denied.

Dated: February 24, 1994.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1993

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF THE CALIFORNIA APPELLATE PROJECT IN SUPPORT OF PETITIONERS

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BRIEF AMICUS CURIAE OF THE CALIFORNIA APPELLATE PROJECT IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

The California Appellate Project ("CAP") is a non-profit corporation established by the State Bar of California. It is funded by the California Judicial Council to train and assist appointed counsel in providing representation in state death penalty appeals and habeas corpus proceedings. Pursuant to a grant from the Administrative Office of the United States Courts, CAP also

assists the federal courts by recruiting, training and assisting appointed counsel in federal habeas corpus proceedings on behalf of death-sentenced prisoners in California.

As an organization that provides assistance in many of the pending death judgment cases in California, CAP is in a unique position to provide the Court with an analysis of the questions presented in these consolidated cases.

CAP has received written consent of the parties to file this amicus brief.

SUMMARY OF ARGUMENT

When a state uses aggravating factors to minimize the risk of arbitrary imposition of the death sentence, it may not use factors which as a practical matter fail to guide the sentencer's discretion. In California, the instructions given to the jury make clear beyond any doubt that aggravating factors are a critical component of the jury's decision whether a defendant should live or die. Thus, these aggravating factors must comply with the Eighth Amendment; they must furnish the sentencer with clear standards that provide specific guidance as to whether death should be imposed.

In the two cases upon which certiorari has been granted, jurors were instructed that in determining if the defendant should be put to death, they could find and weigh as an aggravating factor "the circumstances of the crime" and the "age of the defendant." On their face, neither of these aggravating factors provides the sentencer with the type of specific and detailed guidance essential to aggravating factors used in determining if a defendant will live or die. Because the state supreme court has failed to provide any limiting construction of these factors, they have been used, from case to case, to generate illusory aggravators and inject constitutionally impermissible randomness and arbitrariness into the sentencing process.

A further source of confusion in the application of California's capital sentencing scheme is the California statute's failure to designate which of the statutory sentencing factors are mitigating. Although the state supreme court has construed seven of the factors to be exclusively mitigating, the court has declined to

require trial courts to either inform the jury that these factors are mitigating circumstances or delete these factors from the penalty phase instructions when they are factually irrelevant. As a result, in many California cases, juries have been invited to convert the absence of a statutory mitigating circumstance into the presence of an aggravating circumstance, thereby placing additional illusory factors on death's side of the scale and further distorting the decision making process.

ARGUMENT

The Eighth Amendment principles that apply to this case are clearly established by the Court's decisions. When a state chooses to impose capital punishment, the Eighth Amendment requires it to "adopt procedural safeguards against arbitrary and capricious impositions of the death penalty." *Sawyer v. Whitley*, 505 U.S. ____, 112 S. Ct. 2514, 2520 (1992). *Accord Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976). A state capital punishment scheme must comply with the Eighth Amendment's "fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action" in imposing the death penalty. *Maynard v. Cartwright*, 486 U.S. 356, 362 (1988).

Where a state elects to meet this Eighth Amendment obligation by articulating a set of aggravating and mitigating factors, and where the aggravating factors are critical "in deciding who shall be eligible for the death penalty or who shall receive the death penalty, [the state] cannot use factors which as a practical matter fail to guide the sentencer's discretion." *Stringer v. Black*, 503 U.S. ____, 112 S. Ct. 1130, 1139 (1992). Thus, as the Court has repeatedly made clear, in states like Florida, Mississippi and Oklahoma — where the sentencer is told that it must weigh aggravating and mitigating factors to determine if a defendant should live or die — the state may not rely on unconstitutionally vague aggravating factors. *See, e.g., Espinosa v. Florida*, 505 U.S. ____, 112 S. Ct. 2926 (1992) (Florida); *Shell v. Mississippi*, 498 U.S. 1 (1990) (Mississippi); *Maynard v. Cartwright*, 486 U.S. 356 (1988) (Oklahoma).

I

THE AGGRAVATING FACTORS THAT A CALIFORNIA JURY WEIGHS IN DETERMINING WHETHER A DEFENDANT SHOULD LIVE OR DIE ARE CENTRAL TO THE PENALTY DETERMINATION.

As two Justices of this Court have recently noted, California — just like Florida, Mississippi and Oklahoma — "requires its juries to weigh aggravating and mitigating circumstances" in determining whether death is an appropriate penalty. *Pensinger v. California*, ___ U.S. ___, 112 S. Ct. 351 (1991) (O'Connor, J., dissenting from the denial of certiorari, joined by Kennedy, J.) *See also Boyde v. California*, 494 U.S. 370, 374, 377 (1990) (observing that California juries are told to weigh aggravating and mitigating circumstances in determining penalty); *California v. Brown*, 479 U.S. 538, 540 (1987) (same); *California v. Ramos*, 463 U.S. 992, 995 n.3 (1983) (same).

The statute explicitly requires the jury to determine the appropriate punishment by weighing aggravating circumstances against mitigating circumstances:

> [The trier of fact] shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances the trier of fact shall impose a sentence of confinement in a state prison for life without the possibility of parole.

Cal. Pen. Code § 190.3.

The California Supreme Court has itself long recognized that the role of aggravating and mitigating factors in the penalty determination process is identical to the role those factors play in Florida, a state statute with which this Court has much experience. As early as 1979, in interpreting a predecessor statute to the current law which provided that the jury was to be guided by a list of aggravating and mitigating factors almost identical to that present in the current statute, the state court concluded that the factors set forth in section 190.3 are "essentially equivalent to the provision in the valid Florida statute requiring the sentencing

authority to 'weigh' [aggravating and mitigating] factors in reaching its decision." *People v. Frierson*, 25 Cal.3d 142, 180, 599 P.2d 587, 610 (1979).[1] The "California statute lists specific factors which must be considered in deciding whether or not to impose the death penalty." *Id.* at 177, 599 P.2d at 608. The state court explicitly concluded that use of the aggravating and mitigating factors under the California scheme was "almost identical" to the use of such factors in Florida. *Id.*

The state court has taken a similar view in interpreting the current statute, which requires that the jury not merely be "guided by" the aggravating and mitigating factors but "shall impose" death if aggravating factors outweigh mitigating factors. Reaffirming the central role played by the aggravating and mitigating factors, the court has noted that section 190.3 "require[s] the jury to decide the appropriateness of the death penalty by a process of weighing the specific factors listed in the statute." *People v. Boyd*, 38 Cal.3d 762, 773, 700 P.2d 782, 790 (1985). Indeed, as *Boyd* held, under the current statute, unlike the 1977 statute, the list of factors is exclusive, thus making the role of the statutory aggravating factors all the more important. *Id.* at 772-73, 700 P.2d at 789-90.

In a series of more recent cases, the court has continued to emphasize the critical role played by aggravating factors in the determination of penalty, noting that "the crux of the jury's decision is the weighing of aggravating and mitigating factors ...." *People v. Kaurish*, 52 Cal.3d 648, 706, 802 P.2d 278, 309 (1990), *cert. denied*, 112 S. Ct. 121 (1991). *Accord People v. Brown*, 40 Cal.3d 512, 544, 709 P.2d 440, 458 (1985), *rev'd. on other grounds*, 479 U.S. 538 (1987) ("[Section 190.3] simply

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[1] The predecessor statute was former California Penal Code section 190.3, a provision of California's 1977 death penalty legislation in effect from August 11, 1977 (Cal. Stats. 1977, ch. 316) until November 8, 1978, when it was superseded by the current statute, enacted by Initiative Measure, approved November 7, 1978. The factors listed under former section 190.3 were essentially identical to the factors listed under the current statute, with one exception, i.e., former section 190.3 did not include what is now factor (c) covering prior felony convictions.

makes clear that, in resolving the ultimate issue of punishment ... the jurors are to limit their consideration to 'the specific factors listed in the statute.' ")[2]

Amicus recognizes that in a case decided *after* this Court granted certiorari in *Proctor* and *Tuilaepa*, the state court has departed from its historic view as to the role of aggravating factors under the California statute. The state court has now held that because the factors in section 190.3 are "only" used to determine whether a defendant should live or die, and do not determine whether the defendant is "death eligible," the full dictates of the Eighth Amendment do not apply to those factors. *People v. Bacigalupo*, 6 Cal.4th 457, 475, 862 P.2d 808, (1993), *on remand from Bacigalupo v. California*, 506 U.S. ____, 113 S. Ct. 32 (1992).

In reaching this conclusion, the state court also articulated a very new, and much more limited, role for the factors set forth in section 190.3, a role that it concluded exempts these factors from the Eighth Amendment scrutiny applied to aggravating factors in every other state. According to the state court's current view, the factors set forth in section 190.3 are no longer "essentially equivalent" to the aggravating factors in Florida. Instead, "the section 190.3 'aggravating' factors in California's capital sentencing scheme do no more than direct attention" to "facts about the offense and the offender that will weigh in the sentencing decision in favor of the more severe penalty of death." *People v. Bacigalupo*, 6 Cal.4th at 477, 862 P.2d at ____. On this basis, the

[2] In *Brown*, the state court also held that the weighing process mandated by state law was not to be a mere counting of aggravating and mitigating factors. Instead, the jury was to weigh aggravating and mitigating factors and decide if death was the appropriate punishment. 40 Cal.3d at 543-44, 709 P.2d at 455-56. In reaching this interpretation, the state court once again explicitly reaffirmed that it was construing the California statute to be just like Florida's. *Id.* at 543, 709 P.2d at 456-57. *See Barclay v. Florida*, 463 U.S. 939, 963-64 (1983) (concurring opinion of Stevens, J., describing Florida scheme). Indeed, the same is true in Mississippi; although the jury is told to weigh aggravating and mitigating circumstances, its ultimate responsibility is to determine if death is the appropriate punishment. Miss. Code Ann. § 99-19-101(d).

court concluded that the state was free to use factors which as a practical matter fail to guide the sentencer's discretion. *Id.*

Of course, as a matter of federal law, the state court's view that aggravating factors used only to determine whether a defendant should live or die are exempt from full constitutional scrutiny is simply wrong. Justice Kennedy's opinion for the Court in *Stringer v. Black* could not have been more clear as to this point, squarely holding that "if a State uses aggravating factors in deciding who shall be eligible for the death penalty or who shall receive the death penalty, [the State] cannot use factors which as a practical matter fail to guide the sentencer's discretion." 503 U.S. at ____, 112 S. Ct. at 1139.

Conceivably, if a jury were instructed in accord with the state court's current view of the limited role of section 190.3 factors, the state might be free at the penalty phase to call the jury's attention to facts which do not in any way objectively guide the sentencer's discretion.[3] However, in the two cases now before this Court — and others presented to sentencing juries prior to the state court's recent *Bacigalupo* decision — the instructions and argument given simply do not reflect the state court's current limited view of the section 190.3 factors. *See Shuttlesworth v. Birmingham*, 382 U.S. 87, 91-92 (1965) (in addressing a vagueness challenge to a state statute, courts must look at judicial interpretations of the statute at the time it was applied to defendant). *Accord Smith v. Goguen*, 415 U.S. 566, 570-72 (1974); *Lanzetta v. New Jersey*, 306 U.S. 451, 456-57 (1939). To the contrary, these instructions are consistent with the state court's then current approach to section 190.3 which "require[d]

[3] If this were the case, however, the full burden of insuring that the jury receives constitutionally adequate guidance would necessarily fall upon the "special circumstance" findings made at the guilt phase. Given that California has the broadest array of special circumstance findings used to make a defendant death eligible in the entire country, intended by the drafters of the statute in their own words to "apply to every murderer," it is not at all clear that California would be left with a constitutional statute under this construction. 1978 California Voter's Pamphlet, p. 34, Argument in Support of Proposition 7. This question is not before the Court in these cases, however.

[the] jur[y] to weigh [the] aggravating and mitigating circumstances" in determining whether death was an appropriate penalty. *Pensinger v. California*, ____ U.S. at ____, 112 S. Ct. at 351.

In fact, consistent with the state court's longstanding approach to section 190.3, an examination of California capital cases shows beyond any doubt that prosecutors throughout the state have long been advising juries that the process they are required to engage in before imposing a death sentence is a weighing of the statutory aggravating and mitigating factors. The following are representative arguments from prosecutors in California death penalty trials:

- "You might list all of the mitigating factors on one side of the scale, list all of the aggravating factors on the other side of the scale, and make a finding of fact and answer this question: Did the aggravating factors outweigh the mitigating factors? . . . If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death." *People v. Hendricks*, 44 Cal.3d 635, 658, 749 P.2d 836, 849, *cert. denied*, 488 U.S. 900 (1988).

- "If you decide that the aggravating circumstances outweigh the mitigating circumstances, then you must return a verdict of death." *People v. McLain*, 46 Cal.3d 97, 117, 757 P.2d 569, 580 (1988), *cert. denied*, 489 U.S. 1072 (1989).

- "If you find that aggravating factors outweigh, and it can be a slight outweigh, it will be your obligation to return a verdict of death." *People v. Boyde*, 46 Cal.3d 212, 262-63, 758 P.2d 25, 55 (1988), *aff'd*, 494 U.S. 370 (1990).

- "The law . . . boils down to a simple solution of balancing. You have to balance in this case a set of aggravating factors versus a set of mitigating factors. And if you find that one of the factors outweighs the other, then it's simply your duty as jurors to make a decision in favor of those factors which outweigh the other." *People v. Bean*, 46 Cal.3d 919, 956, 760 P.2d 996, 1019 (1988), *cert. denied*, 494 U.S. 1038 (1990).

- "[I]f you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose the sentence of death." *People v. Hamilton*, 48 Cal.3d 1142, 1181, 774 P.2d 730, 754 (1989), *cert. denied*, 494 U.S. 1039 (1990).

- If aggravating factors outweigh mitigating factors "[y]ou do not have [any] discretion. . . . [I]t is your duty to return a verdict of death." *People v. Kaurish*, 52 Cal.3d 648, 713-14, 802 P.2d 278, 314 (1990), *cert. denied*, 112 S. Ct. 121 (1991).

- "So if you conclude that the aggravating circumstances outweigh the mitigating circumstances, you are obligated to return a verdict of death." *People v. Proctor*, 4 Cal.4th 499, 547, 842 P.2d 1100, 1128 (1992), *cert. granted*, 114 S. Ct. 598 (1993).

These statements illustrate that in practice, as well as under the state court's longstanding construction of the state statute, the aggravating and mitigating factors set forth in section 190.3 are central to the penalty determination. Indeed, in accord with the statute, prosecutors arguing for a death sentence have often prepared and presented charts containing a list of the aggravating and mitigating factors in a particular case and taken pains to urge the jury to find each and every aggravating factor on the list.[4] This approach is a natural response to a scheme which requires the

[4] *See, e.g., People v. Montiel*, 5 Cal.4th 877, 939 n.36, 855 P.2d 1277, 1313 n.36 (1993); *People v. Clark*, 3 Cal.4th 41, 165 n.24, 833 P.2d 561, 632 n.24 (1992), *cert. denied*, 113 S. Ct. 1604 (1993); *People v. Hardy*, 2 Cal.4th 86, 202, 825 P.2d 781, 852, *cert. denied*, 113 S. Ct. 498 (1992); *People v. Gonzalez*, 51 Cal.3d 1179, 1228-29, 1230 n.28, 800 P.2d 1159, 1184-85 n.28 (1990), *cert. denied*, 112 S. Ct. 117 (1991); *People v. Douglas*, 50 Cal.3d 468, 537, 788 P.2d 640, 681 (1990), *cert. denied*, 498 U.S. 1110 (1991); *People v. Hamilton*, 48 Cal.3d 1142, 1183-86, 774 P.2d 730, 755-57 (1989), *cert. denied*, 494 U.S. 1039 (1990); *Id.* at 1188 and 1192 (Broussard, J., dissenting in part); *People v. Guzman*, 45 Cal.3d 915, 971-72, 755 P.2d 917, 952-53 (1988), *cert. denied*, 488 U.S. 1050 (1989) (Mosk, J., dissenting in part); *People v. Ghent*, 43 Cal.3d 739, 782, 739 P.2d 1250, 1278 (1987), *cert. denied*, 485 U.S. 929 (1988) (Broussard, J., concurring).

jury to weigh aggravating and mitigating factors. Obviously, before a jury can weigh such factors, it must necessarily make a finding as to which aggravating factors actually go into the weighing process. It is inconceivable that a jury charged with the solemn task of weighing aggravating and mitigating factors to determine whether a defendant will live or die would engage in that task without deciding which aggravating factors have been established. Indeed, it is impossible to engage in the mandated weighing process without making findings regarding the existence or non-existence of particular aggravating factors.[5]

It is clear, therefore, that aggravating factors under the California scheme are a critical facet of the jury's decision whether to sentence a defendant to death. Their function in the sentencing process subjects them to the constitutional rule that where a state chooses to make "aggravating factors . . . central in the weighing phase of a capital sentencing proceeding . . . use of a vague or imprecise aggravating factor in the weighing process invalidates the sentence and at the very least requires constitutional harmless error analysis or appellate reweighing in the state judicial system." *Stringer v. Black*, 503 U.S. at ____, 112 S. Ct. at 1140.[6]

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[5] In *Proctor v. California*, No. 93-5161, the jury was instructed that "before you may consider a particular aggravating circumstance to be true, you must be satisfied of the existence of that aggravating circumstance beyond a reasonable doubt." (RT 1558.)

[6] In *Proctor* and *Tuilaepa* the instructions, closing arguments and verdict forms made quite clear that the aggravating factors were critical to the jury's ultimate determination of penalty. *Proctor v. California*, No. 93-5161, RT 1474, 1558, 1562; CT 479 (instructions, argument and verdict forms all told the jury that if aggravating factors outweighed mitigating factors, it was required to impose a death sentence); *Tuilaepa v. California*, No. 93-5131, (RT 839, 864, 870, 885-87; CT 225-26) (instructions, argument and verdict forms all told the jury that the weighing process was central to the sentencing determination, and that death could be imposed only if the aggravating circumstances substantially outweighed the mitigating circumstances).

II

WHERE A SENTENCING JURY IS INSTRUCTED TO WEIGH AGGRAVATING AND MITIGATING CIRCUMSTANCES IN DETERMINING WHETHER THE DEFENDANT SHOULD LIVE OR DIE, INSTRUCTING THE JURY TO WEIGH AS AN AGGRAVATING CIRCUMSTANCE THE "CIRCUMSTANCES OF THE CRIME" OR THE "AGE" OF THE DEFENDANT VIOLATES THE EIGHTH AMENDMENT.

A. An Aggravating Factor Is Unconstitutionally Vague Where Its Own Terms Furnish No Discernible Standards For The Sentencer And The State Courts Have Failed To Provide A Limiting Construction.

This Court has repeatedly held that when a state chooses to rely upon the presence of aggravating factors to satisfy the "fundamental constitutional requirement [of] sufficiently minimizing the risk of wholly arbitrary and capricious action," those factors must furnish the sentencer with "clear and objective standards" that provide "specific and detailed guidance." *Lewis v. Jeffers*, 497 U.S. 764, 774 (1990); *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980); *Gregg v. Georgia*, 428 U.S. 153, 198 (1976); *Proffitt v. Florida*, 428 U.S. 242, 253 (1976). An aggravating factor is unconstitutionally vague "if its description is so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor." *Espinosa v. Florida*, 505 U.S. at ____, 112 S. Ct. at 2928.

The first step in deciding whether a particular aggravating factor is unconstitutionally vague is to "determine whether the statutory language defining the circumstance is itself too vague to provide any guidance to the sentencer." *Arave v. Creech*, 507 U.S. ____, 113 S. Ct. 1534, 1541 (1993). If the language is indeed vague, the next step is to determine whether the "state courts have further defined the vague terms" with a constitutionally sufficient limiting construction. *Id.*

To determine whether an aggravating circumstance is unclear —or whether a proper limiting construction has been utilized— requires an inquiry into state court applications of the aggravating

factor. *See, e.g. Sochor v. Florida*, 504 U.S. ____, 112 S. Ct. 2114, 2121-22 (1992); *Proffitt v. Florida*, 428 U.S. at 255, n.12 (joint opinion of Stewart, Powell and Stevens, JJ.). *Accord Arave v. Creech*, 507 U.S. at ____, 113 S. Ct. at 1544. Where those applications reveal that the state courts have never articulated a limiting construction which provides "specific and detailed guidance," the aggravating factor is constitutionally infirm. *Maynard v. Cartwright*, 486 U.S. at 360-64; *Godfrey v. Georgia*, 446 U.S. at 428-33. *See also Clemons v. Mississippi*, 494 U.S. 738, 756 (1990) (Blackmun, J. concurring).

B. Instructing The Jury In The Bare Terms Of Penal Code Section 190.3(a) To Weigh The "Circumstances Of The Crime" Aggravating Factor In Deciding Whether A Defendant Should Live Or Die, Without Any Limiting Construction, Is Unconstitutional.

California Penal Code section 190.3(a) authorizes the sentencing jury to weigh the "circumstances of the crime" as an aggravating factor. There can be no serious dispute that this statutory language "fails to furnish principled guidance for the choice between death and a lesser penalty." *Richmond v. Lewis*, 506 U.S. ____, 113 S. Ct. 528, 534 (1992).

In fact, the Court has long held that a sentencer may *not* simply look at the circumstances surrounding a crime and determine that a death penalty is appropriate. *See, e.g., Maynard v. Cartwright*, 486 U.S. at 363; *Godfrey v. Georgia*, 446 U.S. at 429-33; *Furman v. Georgia*, 408 U.S. 238, 239-40, 255-57, 309-10, 314 (1972). As the Court concluded unanimously in *Maynard*, "[w]e have plainly rejected the submission that a particular set of facts surrounding a murder, however shocking they might be, were enough in themselves, and without some narrowing principle to apply to those facts, to warrant the imposition of the death penalty." 486 U.S. at 363. *Accord Cartwright v. Maynard*, 822 F.2d 1477, 1491 (10th Cir. 1987), *aff'd*, 486 U.S. 356 (1988) ("the discretion of a sentencer who can rely upon all the circumstances of a murder is as complete and as unbridled as the discretion afforded the jury in *Furman*").

Thus, on its face the aggravating factor set forth in section 190.3(a) violates the Eighth Amendment's requirement that aggravating factors central to the penalty determination furnish the sentencer with "clear and objective standards" that provide "specific and detailed guidance." The question then becomes whether the state courts have articulated and applied a limiting construction to this factor.

Certainly the state supreme court has never articulated a limiting construction of the "circumstances of the crime" aggravating factor. That court has seen no need to do so because it has consistently held that the language of the statute is neither '"illusory' nor otherwise impermissibly 'vague'." *People v. Tuilaepa*, 4 Cal.4th at 595, 842 P.2d at 1158. *Accord People v. Proctor*, 4 Cal.4th at 551, 842 P.2d at 1130; *People v. Noguera*, 4 Cal.4th 599, 648-49, 842 P.2d 1160, 1189-90 (1992); *People v. Sims*, 5 Cal.4th 405, 465-66, 853 P.2d 992, 1030 (1993). Indeed, in admitting that it had not yet "explored the outer reaches" of facts which would comprise the "circumstances of the crime" aggravating factor, the state court has actually expanded the definition of this factor, noting that it "does not mean merely the immediate temporal and spatial circumstances of the crime." *People v. Edwards*, 54 Cal.3d 787, 833, 835, 819 P.2d 436, 467 (1991), *cert. denied*, 113 S. Ct. 642 (1992) (emphasis added).

Having at all times found that the broad term "circumstances of the crime" met constitutional scrutiny, the state supreme court has never applied a limiting construction to this factor. Instead, the state court has remained true to the extraordinary expansion of this factor announced in *Edwards*, approving reliance on the "circumstance of the crime" aggravating factor because defendant had a "hatred of religion,"[7] or because three weeks after the crime defendant sought to conceal evidence,[8] or threatened wit-

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[7] *People v. Nicolaus*, 54 Cal.3d 551, 581-82, 817 P.2d 893, 908-09 (1991), *cert. denied*, 112 S. Ct. 3040 (1992).

[8] *People v. Walker*, 47 Cal.3d 605, 639 n.10, 765 P.2d 70, 90 n.10 (1988), *cert. denied*, 494 U.S. 1038 (1990).

nesses after his arrest,[9] or disposed of the victim's body in a manner that precluded its recovery.[10]

Nor has the state supreme court's refusal to articulate a limiting construction for factor (a) gone unnoticed by the state's prosecutors. To the contrary, prosecutors throughout the state have capitalized on the extraordinary breadth of factor (a) to argue that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Thus, prosecutors have been permitted to argue that "circumstances of the crime" is an aggravating factor to be weighed on death's side of the scale:

- Because the defendant struck many blows and inflicted multiple wounds,[11] or because the defendant killed with a single execution-style wound.[12]

- Because the defendant killed the victim for some purportedly aggravating motive (money, revenge, witness-elimination, avoiding arrest, sexual gratification)[13] or because the defendant killed the victim without any motive at all.[14]

- Because the defendant killed the victim in cold blood[15] or because the defendant killed the victim during a savage frenzy.[16]

- Because the defendant engaged in a cover up to conceal his crime,[17] or because the defendant did not engage in a cover up and so must have been proud of it.[18]

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[9] *People v. Hardy*, 2 Cal.4th 86, 204, 825 P.2d 781, 853, *cert. denied*, 113 S. Ct. 498 (1992).

[10] *People v. Bittaker*, 48 Cal.3d 1046, 1110 n.35, 774 P.2d 659, 697 n.35 (1989), *cert. denied*, 496 U.S. 931 (1990).

[11] *See, e.g., People v. Morales*, Cal. Sup. Ct. No. [hereinafter "No."] S004552, RT 3094-95 (defendant inflicted many blows); *People v. Zapien*, No. S004762, RT 36-38 (same); *People v. Lucas*, No. S004788, RT 2997-98 (same); *People v. Carrera*, No. S004569, RT 160-61 (same).

[12] *See, e.g., People v. Freeman*, No. S004787, RT 3674, 3709 (defendant killed with single wound); *People v. Frierson*, No. S004761, RT 3026-27 (same).

[13] *See, e.g., People v. Howard*, No. S004452, RT 6772 (money); *People v. Allison*, No. S004649, RT 968-69 (same); *People v. Belmontes*, No. S004467, RT 2466 (eliminate a witness); *People v. Coddington*, No. S008840, RT 6759-60 (sexual gratification); *People v. Ghent*, No. S004309, RT 2553-55 (same); *People v. Brown*, No. S004451, RT 3543-44 (avoid arrest); *People v. McLain*, No. S004370, RT 31 (revenge).

[14] *See, e.g., People v. Edwards*, No. S004755, RT 10544 (defendant killed for no reason); *People v. Osband*, No. S005233, RT 3650 (same); *People v. Hawkins*, No. S014199, RT 6801 (same).

[15] *See, e.g., People v. Visciotti*, No. S004597, RT 3296-97 (defendant killed in cold blood).

[16] *See, e.g., People v. Jennings*, No. S004754, RT 6755 (defendant killed victim in savage frenzy [trial court finding]).

[17] *See, e.g., People v. Stewart*, No. S020803, RT 1741-42 (defendant attempted to influence witnesses); *People v. Benson*, No. S004763, RT 1141 (defendant lied to police); *People v. Miranda*, No. S004464, RT 4192 (defendant did not seek aid for victim).

[18] *See, e.g., People v. Adcox*, No. S004558, RT 4607 (defendant freely informs others about crime); *People v. Williams*, No. S004365, RT 3030-31 (same); *People v. Morales*, No. S004552, RT 3093 (defendant failed to engage in a cover-up).

- Because the defendant made the victim endure the terror of anticipating a violent death[19] **or** because the defendant killed instantly without any warning.[20]
- Because the victim had children,[21] **or** because the victim had not yet had a chance to have children.[22]
- Because the victim struggled prior to death,[23] **or** because the victim did not struggle.[24]
- Because the defendant had a prior relationship with the victim,[25] **or** because the victim was a complete stranger to the defendant.[26]

These examples show that absent any limitation on the "circumstances of the crime" aggravating factor, different prosecutors have urged juries to find this aggravating factor and place it on death's side of the scale based on squarely conflicting circumstances.

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[19] *See, e.g., People v. Webb*, No. S006938, RT 5302; *People v. Davis*, No. S014636, RT 11125; *People v. Hamilton*, No. S004363, RT 4623.

[20] *See, e.g., People v. Freeman*, No. S004787, RT 3674 (defendant killed victim instantly); *People v. Livaditis*, No. S004767, RT 2959 (same).

[21] *See, e.g., People v. Zapien*, No. S004762, RT 37 (Jan. 23, 1987) (victim had children).

[22] *See, e.g., People v. Carpenter*, No. S004654, RT 16752 (victim had not yet had children).

[23] *See, e.g., People v. Dunkle*, No. S014200, RT 3812 (victim struggled); *People v. Webb*, No. S006938, RT 5302 (same); *People v. Lucas*, No. S004788, RT 2998 (same).

[24] *See, e.g., People v. Fauber*, No. S005868, RT 5546-47 (no evidence of a struggle); *People v. Carrera*, No. S004569, RT 160 (same).

[25] *See, e.g., People v. Padilla*, No. S014496, RT 4604 (prior relationship); *People v. Waidla*, No. S020161, RT 3066-67 (same); *People v. Kaurish*, 52 Cal.3d at 717, 802 P.2d at 316 (same).

[26] *See, e.g., People v. Anderson*, No. S004385, RT 3168-69 (no prior relationship); *People v. McPeters*, No. S004712, RT 4264 (same).

Of equal importance, prosecutors have been permitted to use the "circumstances of the crime" aggravating factor to embrace facts which cover the entire spectrum of facets inevitably present in every homicide:

- *The age of the victim.* Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was a child, an adolescent, a young adult, in the prime of life, or elderly;[27]
- *The method of killing.* Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was strangled, bludgeoned, shot, stabbed or consumed by fire.[28]
- *The motive of the killing.* Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the defendant killed for money, to eliminate a witness, for sexual gratification, to avoid arrest, for revenge, or for no motive at all.[29]

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[27] *See, e.g., People v. Deere*, No. S004722, RT 155-56 (victims were young, ages 2 and 6); *People v. Bonin*, No. S004565, RT 10075 (victims were adolescents, ages 14, 15 and 17); *People v. Kipp*, No. S009169, RT 5164 (victim was a young adult, age 18); *People v. Carpenter*, No. S004654, RT 16752 (victim was 20); *People v. Phillips*, 41 Cal.3d 29, 63, 711 P.2d 423, 444 (1985) (26-year-old victim was "in the prime of his life"); *People v. Samayoa*, No. S006284, XL RT 49 (victim was an adult "in her prime"); *People v. Kimble*, No. S004364, RT 3345 (61-year-old victim was "finally in a position to enjoy the fruits of his life's efforts"); *People v. Melton*, No. S004518, RT 4376 (victim was 77); *People v. Bean*, No. S004387, RT 4715-16 (victim was "elderly").

[28] *See, e.g., People v. Clair*, No. S004789, RT 2474-75 (strangulation); *People v. Kipp*, No. S004784, RT 2246 (same); *People v. Fauber*, No. S005868, RT 5546 (use of an ax); *People v. Benson*, No. S004763, RT 1149 (use of a hammer); *People v. Cain*, No. S006544, RT 6786-87 (use of a club); *People v. Jackson*, No. S010723, RT 8075-76 (use of a gun); *People v. Reilly*, No. S004607, RT 14040 (stabbing); *People v. Scott*, No. S010334, RT 847 (fire).

[29] *See, e.g., People v. Howard*, No. S004452, RT 6772 (money); *People v. Allison*, No. S004649, RT 969-70 (same); *People v.*

- *The time of the killing.* Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in the middle of the night, late at night, early in the morning or in the middle of the day.[30]

- *The location of the killing.* Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in her own home, in a public bar, in a city park or in a remote location.[31]

The foregoing examples of how the factor (a) aggravating circumstance is actually being applied in practice make clear beyond peradventure that it is being relied upon as an aggravating factor in every case, by every prosecutor, without any limitation whatever. As a consequence, from case to case, prosecutors have been permitted to turn entirely opposite facts—or facts that are inevitable variations of every homicide—into an aggravating factor which the jury is urged to weigh on death's side of the scale. This is the precise type of arbitrariness which, as *Stringer* warns, is created by vague aggravating factors weighed in the sentencing process.

Belmontes, No. S004467, RT 2466 (eliminate a witness); *People v. Coddington*, No. S008840, RT 6759-61 (sexual gratification); *People v. Ghent*, No. S004309, RT 2553-55 (same); *People v. Brown*, No. S004451, RT 3544 (avoid arrest); *People v. McLain*, No. S004370, RT 31 (revenge); *People v. Edwards*, No. S004755, RT 10544 (no motive at all).

[30] *See, e.g., People v. Fauber*, No. S005868, RT 5777 (early morning); *People v. Bean*, No. S004387, RT 4715 (middle of the night); *People v. Avena*, No. S004422, RT 2603-04 (late at night); *People v. Lucero*, No. S012568, RT 4125-26 (middle of the day).

[31] *See, e.g., People v. Anderson*, No. S004385, RT 3167-68 (victim's home); *People v. Cain*, No. S006544, RT 6787 (same); *People v. Freeman*, No. S004787, RT 3674, 3710-11 (public bar); *People v. Ashmus*, No. S004723, RT 7340-41 (city park); *People v. Carpenter*, No. S004654, RT 16749-50 (forested area); *People v. Comtois*, No. S017116, RT 2970 (remote, isolated location).

In practice, section 190.3's broad "circumstances of the crime" aggravating factor allows *precisely* what *Maynard* sought to preclude. It licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, . . . were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." *Maynard v. Cartwright*, 486 U.S. at 363. Thus, instructing the jury in the bare terms of section 190.3 violates the Eighth Amendment.

C. Allowing The Jury To Weigh The Aggravating Factor Of The Defendant's Age, As It Has Been Broadly Construed By The State Supreme Court, Violates The Eighth Amendment.

California Penal Code section 190.3(i) directs the jury to consider the "age of the defendant at the time of the crime." On its face, this statute gives the jury no guidance as to what age might constitute an aggravating factor, or what standards should be used in making this decision. Thus, on its face, this factor violates the Eighth Amendment's requirement that aggravating factors provide the sentencer with clear, specific guidance.

The state supreme court has not only failed to articulate a limiting construction of the age factor that would cure its vagueness, but it has articulated a definition of "age" that makes it as vague and standardless as it possibly could be. The California Supreme Court has not limited this factor to simple chronological age. Rather, it has interpreted this factor to be "a metonym for *any age-related matter* suggested by the evidence or by common experience or morality that might reasonably inform the choice of penalty." *People v. Lucky*, 45 Cal.3d 259, 302, 753 P.2d 1052, 1080 (1988), *cert. denied*, 488 U.S. 1034 (1989) (emphasis added).[32]

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[32] The state court has in fact held that factor (i) does not permit aggravation on the basis of "mere chronological age," *People v. Lucky*, 45 Cal.3d at 302, 753 P.2d at 1080; *People v. Rodriguez*, 42 Cal.3d 730, 789, 726 P.2d 113, 151 (1986), but it has never required that either this limitation on factor (i) or the court's expansive metonym construction of the factor be conveyed to California sentencing juries.

Once again, the state supreme court's unwillingness to articulate a limiting construction for this factor has not gone unnoticed by the state's prosecutors. Prosecutors throughout the state have capitalized on this failure, applying it exactly the way one would expect based on the state court's interpretation — inconsistently and arbitrarily. Thus, although a defendant cannot be subjected to the death penalty in California unless he was at least 18 years old at the time of the crime, in some cases prosecutors have argued that the age factor was aggravating where the defendant was in his late teens or early twenties at the time of the crime, while in other cases they have conceded that the defendant's youth was a mitigating factor. Prosecutors have argued that:

- Age 18 is an aggravating factor.[33]
- Age 19 is an aggravating factor.[34]
- Age 20 is a mitigating factor.[35]

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[33] *See, e.g., People v. Noguera*, No. S005170, RT 8640-41; *People v. Kimble*, No. S004364, RT 3348-51. But see *People v. Leach*, 41 Cal.3d 92, 111, 710 P.2d 893, 904 (1985) (California Supreme Court treats age 18 as a mitigating factor); *People v. Bell*, No. S004260, RT 1023 (prosecutor asserts that *had* defendant been 18 years old at the time of the crime it would be appropriate to treat age as a mitigating factor); *People v. Babbitt*, S22692, RT 5105 (same); *People v. Anderson*, No. S004385, RT 3156-57 (same); *People v. Kaurish*, No. S004640, RT 4562 (same); *People v. DeSantis*, No. S004706, RT 19840 (same); *People v. Fairbank*, No. S012032, RT 3610 (same); *People v. Ghent*, No. S004309, RT 2566 (same); *People v. Pinholster*, No. S004616, RT 7440 (same); *People v. Jennings*, 46 Cal.3d 963, 989, 760 P.2d 475, 491 (1988), *cert. denied*, 489 U.S. 1091 (1989) (same).

[34] *See, e.g., People v. Williams*, No. S004522, RT 1041; *People v. Avena*, No. S004422, RT 2611-12; *People v. Boyette*, No. S032736, RT 2007, 2014.

[35] *See, e.g., People v. Babbitt*, No. S22692, RT 5105; *People v. Carrera*, No. S004569, RT 173. *But see People v. Bean*, 46 Cal.3d at 952 n.18, 760 P.2d at 1017 n.18, No. S004387, RT 4718-19 (age 20 is aggravating).

- Age 21 is an aggravating factor.[36]
- Age 22 is an aggravating factor.[37]
- Age 24 is a mitigating factor.[38]

Even in the same case, the prosecutor and the trial judge have come to opposite conclusions about whether to treat the defendant's age as an aggravating factor, a mitigating factor, or neither:

- District attorney argued that age 19 was aggravating, but trial judge concluded that it was mitigating.[39]
- District attorney argued that age 19 was aggravating, but trial judge concluded that it was neutral.[40]
- District attorney argued that 21 could be either mitigating or aggravating, but trial judge concluded it was not mitigating.[41]

In practice, prosecutors and trial judges have applied the aggravating factor of age to defendants of virtually every age. They have applied it to defendants who were in their teens,[42]

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[36] *See, e.g., People v. Rundle*, No. S012943, RT 9450.

[37] *See, e.g., People v. Mitcham*, 1 Cal.4th 1027, 1076, 824 P.2d 1277, 1310, *cert. denied*, 113 S. Ct. 349 (1992), No. S004636, RT 1908.

[38] *See, e.g., People v. Raley*, No. S005870, RT 9293.

[39] *People v. Williams*, No. S004522, RT 1041, 1155.

[40] *People v. Avena*, No. S004422, RT 2611-12, 2750-51.

[41] *People v. Berryman*, No. S008182, RT 3992, Pronouncement of Judgment at 12.

[42] *See, e.g., People v. Williams*, No. S004522, RT 1041; *People v. Avena*, No. S004422, RT 2611-12; *People v. Boyette*, No. S032736, RT 2007, 2014.

twenties,[43] thirties,[44] forties,[45] and fifties[46] at the time of the crime. These examples demonstrate that, like the "circumstances of the crime," the "age of the defendant," in practice, is exactly the type of vague, illusory aggravating factor that, as *Stringer* warned, injects arbitrariness into the sentencing process.

III

BECAUSE THE CALIFORNIA SUPREME COURT HAS NOT REQUIRED THAT JURIES BE INSTRUCTED AS TO WHICH OF THE FACTORS CONTAINED IN PENAL CODE SECTION 190.3 ARE EXCLUSIVELY MITIGATING, THE ABSENCE OF STATUTORY MITIGATING FACTORS HAS BEEN USED TO CREATE ILLUSORY AGGRAVATING FACTORS.

Penal Code section 190.3 contains a single list of factors and does not designate which factors are aggravating and which are mitigating. The California Supreme Court, however, has made clear that some of the listed factors are intended to be exclusively

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[43] *See, e.g., People v. Bean*, 46 Cal.3d at 952, n.18, 760 P.2d at 1017 n.18, No. S004387, RT 4718-19 (age 20); *People v. Coleman*, 48 Cal.3d 112, 153-54, 768 P.2d 32, 55-56 (1989), *cert. denied*, 494 U.S. 1038 (1990) (age 22); *People v. Sandoval*, 4 Cal.4th 155, 189-90, 841 P.2d 862, 880 (1992), *cert. granted, in part*, 114 S. Ct. 40 (1993) (age 26).

[44] *See, e.g., People v. Gonzalez*, 51 Cal.3d 1179, 1233, 800 P.2d 1159, 1187 (1990), *cert. denied*, 112 S. Ct. 117 (1991) (age 31); *People v. Whitt*, 51 Cal.3d 620, 654, 798 P.2d 849, 869 (1990), *cert. denied*, 111 S. Ct. 2816 (1991) (age 30); *People v. Brown*, 46 Cal.3d 432, 455-56, 758 P.2d 1135, 1151 (1988), *cert. denied*, 489 U.S. 1059 (1989) (age 34); *People v. Edwards*, 54 Cal.3d 787, 844, 819 P.2d 436, 470 (1991), *cert. denied*, 113 S. Ct. 642 (1992) (age 37).

[45] *See, e.g., People v. McLain*, 46 Cal.3d 97, 111-12, 757 P.2d 569, 576-77 (1988), *cert. denied*, 489 U.S. 1072 (1989) (age 41).

[46] *See, e.g., People v. Douglas*, 50 Cal.3d 468, 538, 788 P.2d 640 (1990), *cert. denied*, 498 U.S. 1110 (1991). *See also People v. Nicolaus*, 54 Cal.3d 551, 587, 817 P.2d 893, 913 (1991), *cert. denied*, 112 S. Ct. 3040 (1992).

mitigating. *People v. Davenport*, 41 Cal.3d 247, 288-89, 710 P.2d 861, 888 (1985); *People v. Melton*, 44 Cal.3d 713, 770, 750 P.2d 741, 775, *cert. denied*, 488 U.S. 934 (1988); *People v. Lucero*, 44 Cal.3d 1006, 1031 n.15, 750 P.2d 1342, 1356-57 n.15 (1988); *People v. Hamilton*, 48 Cal.3d 1142, 1184, 774 P.2d 730, 755 (1989), *cert. denied*, 494 U.S. 1039 (1990). These factors are:

> (d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> (e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.
>
> (f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.
>
> (g) Whether or not defendant acted under extreme duress or under the substantial domination of another person.
>
> (h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects of intoxication.
>
> (j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.[47]

---

[47] Factors (d) through (h) and factor (j) of the California statute repeat almost verbatim the language of six of the factors listed in the Model Penal Code. *See* Model Penal Code §§ 210.6(b)-(g). The only significant difference is that the California statute added the confusing prefatory phrase "whether or not."

Some uncertainty has recently arisen as to factor (j). The state court had previously held that factor (j) (the defendant was a minor participant in the offense) was an exclusively mitigating factor. *See, e.g., Hamilton*, 48 Cal.3d at 1184, 774 P.2d at 755, and cases cited in *People v. Proctor*, 4 Cal.4th 499, 553, 842 P.2d 1100, 1132. But in *Proctor*, the court suggested that the defendant's sole participation in the offense

The state court has also made clear that the absence of these mitigating factors in a particular case is not to be considered an aggravating factor. As the court explained, the "purpose of 'aggravating' and 'mitigating' factors is to assess the seriousness of a capital crime in relation to others of the same general character." *People v. Rodriguez*, 42 Cal.3d 730, 788, 726 P.2d 113, 151 (1986). An aggravating circumstance is "a circumstance above and beyond the essential constituent of a crime which increases its guilt or enormity or adds to its injurious consequences." *People v. Davenport*, 41 Cal.3d at 289, 710 P.2d at 888. The absence of a mitigating factor is not a meaningful aggravating factor, because "the absence of mitigation would not automatically render the crime more offensive than any other murder of the same general character." *Id.*

Despite this recognition, the court has refused to require that juries be instructed that the exclusively mitigating factors are mitigating only,[48] or that these factors be deleted from the instructions when factually irrelevant.[49] The court has reasoned that "the aggravating or mitigating nature of these various factors

might be considered an aggravating factor under factor (j). *Id.*, 4 Cal.4th at 553, 842 P.2d at 1132. *See also, People v. Howard*, 1 Cal.4th 1132, 1195, 824 P.2d 1315, 1353, *cert. denied*, 113 S. Ct. 383 (1992).

[48] *See, e.g., People v. Raley*, 2 Cal.4th 870, 919, 830 P.2d 712, 744-45 (1992), *cert. denied*, 113 S. Ct. 1352 (1993); *People v. Jackson*, 28 Cal.3d 264, 316, 618 P.2d 149, 176 (1980), *cert. denied*, 450 U.S. 1035 (1981).

[49] *See, e.g., People v. Sims*, 5 Cal.4th 405, 465, 853 P.2d 992, 1029-30 (1993); *People v. Miranda*, 44 Cal.3d 57, 104-05, 744 P.2d 1127 (1987), *cert. denied*, 486 U.S. 1038 (1988); *People v. Ghent*, 43 Cal.3d 739, 776-77, 739 P.2d 1250, 1274 (1987), *cert. denied*, 485 U.S. 929 (1988).

Although not required to do so, trial judges have on occasion deleted statutory factors not raised by the evidence. This occurred at petitioner Tuilaepa's trial, where the jury was instructed on factors (a), (b), (c), (i) and (k) only (RT 885). In contrast, the jury at petitioner Proctor's trial was instructed on all of the factors contained in section 190.3, and the prosecutor argued that nine of the statutory factors — every factor except factors (b) (presence or absence of violent criminal activity) and

should be self-evident to any reasonable person within the context of each particular case." *People v. Jackson*, 28 Cal.3d at 316, 618 P.2d at 176. Accord, *People v. Zapien*, 4 Cal.4th 929, 990, 846 P.2d 704, 739, *cert. denied*, 114 S. Ct. 315 (1993). Notwithstanding the court's confidence, as a result of the lack of clarifying instructions prosecutors and trial judges in many cases have construed the absence of these mitigating factors as the presence of aggravating factors, permitting illusory aggravation to be weighed in favor of a death sentence.

The following examples are typical of the ways in which prosecutors have encouraged juries to use the absence of mitigating factors as aggravating factors, thereby distorting the weighing process and adding artificial weight to death's side of the scale:

- Illustrating the point with a homemade scale, the district attorney deemed all of the statutory factors to be aggravating, except for the absence of prior felony convictions, and assigned numerical values to each, resulting in a "score" of 22 aggravating points versus 3 mitigating points.[50]
- The district attorney argued that the circumstances of the crime was an aggravating factor, but the absence of prior violent acts was mitigating. He noted that the defendant's prior conviction for a felony was an insignificant aggravating factor. He then classified all the remaining factors except (k) as aggravating. He argued that there were two mitigating and nine aggravating factors. He prepared a chart listing these factors, which the jury took into the jury room. During deliberations, the jury requested a copy of the instructions on which "the chart prepared by the District Attorney was prepared."[51]

Prosecutors have included the absence of statutory mitigating factors in their pretrial notices of aggravation filed with the court

(i) (petitioner's age) — were aggravating factors (RT 1476-81, 1532-34).

[50] *People v. Gonzalez*, 51 Cal.3d at 1233-34, 800 P.2d at 1188.

[51] *People v. Hamilton*, 48 Cal.3d at 1190, 774 P.2d at 759 (Broussard, J., concurring and dissenting).

and served on the defense,[52] and in closing argument have characterized factors (d),[53] (e),[54] (f),[55] (g),[56] (h),[57] and even factor (k),[58] as factors in aggravation, both before and after the state court's decisions construing those factors as mitigating only.

Even in the absence of such prosecutorial arguments, there is no reason to believe that without judicial guidance jurors will correctly interpret the factors. As the state court has recognized, the wording of the statute—and of the instruction patterned upon it—is ambiguous. The use of the phrase "whether or not" is susceptible to the interpretation that the absence of a mitigating factor has some aggravating significance. *People v. Davenport*, 41 Cal.3d at 289, 710 P.2d at 888. Thus the practice of instructing

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[52] *See, e.g., People v. Beardslee*, 53 Cal.3d 68, 112, 806 P.2d 1311, 1336, *cert. denied*, 112 S. Ct. 449 (1991).

[53] *See, e.g., People v. Gonzalez*, 51 Cal.3d at 1233-34, 800 P.2d at 1187-88; *People v. Allison*, 48 Cal.3d 879, 901-02, 771 P.2d. 1294, 1310-11 (1989), *cert. denied*, 494 U.S. 1090 (1990); *People v. Davenport*, 41 Cal.3d at 288-89, 710 P.2d at 888.

[54] *See, e.g., People v. Kelly*, 1 Cal.4th 495, 548-49, 822 P.2d 385, 416 (1992), *cert. denied*, 113 S. Ct. 232 (1992); *People v. Gallego*, 52 Cal.3d 115, 200, 802 P.2d 169, 214 (1990), *cert. denied*, 112 S. Ct. 337 (1991); *People v. Gonzalez*, 51 Cal.3d at 1233-34, 800 P.2d at 1187-88; *People v. Lucero*, 44 Cal.3d at 1031 n.15, 750 P.2d at 1356-57 n.15.

[55] *See, e.g., People v. Kelly*, 1 Cal.4th at 548-49, 822 P.2d at 416; *People v. Gallego*, 52 Cal.3d at 200, 802 P.2d at 214; *People v. Lucero*, 44 Cal.3d at 1031 n.15, 750 P.2d at 1356-57 n.15.

[56] *See, e.g., People v. Montiel*, 5 Cal.4th 877, 936, 855 P.2d 1277, 1311 (1993); *People v. Allison*, 48 Cal.3d at 902, 771 P.2d at 1310; *People v. Davenport*, 41 Cal.3d at 288-89, 710 P.2d at 888.

[57] *See, e.g., People v. Gonzalez*, 51 Cal.3d at 1233-34, 800 P.2d at 1187-88; *People v. Davenport*, 41 Cal.3d at 288-89, 710 P.2d at 888.

[58] *People v. Brown*, 46 Cal.3d at 455, n. 10, 758 P.2d at 1150 n.10: "In his summation, the prosecutor told the jury that 'each of those factors'—apparently, even the alleged *absence* of mitigating evidence under factor (k) ('Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime')—'is an aggravating factor . . .' " (emphasis in original).

on the statutory mitigators, even when they are factually irrelevant, invites the jury to aggravate upon the basis of non-existent factors. Cf. *McCleskey v. Kemp*, 481 U.S. 279, 314 n.37 (1987) (recognizing that "[i]t would be improper and often prejudicial to allow jurors to speculate as to aggravating circumstances wholly without support in the evidence"). Indeed, even trial judges, who are more skilled than jurors at interpreting the law, have, in a number of cases, assigned aggravating weight to the absence of mitigating factors.[59]

An aggravating factor that is based on the absence of one of California's enumerated mitigating factors is the quintessence of an illusory aggravating factor. The California court itself has recognized that some of the factors, including factor (e), victim participation, and factor (f), moral justification, are so unusual that to allow the absence of these factors to be considered aggravating factors is to make them automatically applicable to most murderers. *People v. Davenport*, 41 Cal.3d at 289, 710 P.2d at 888. Those factors that may occur somewhat more frequently, such as minor participation, duress, or extreme mental disturbance, nevertheless still exist in only a small minority of cases. An aggravating factor that exists in nearly every capital case fails to fulfill its purpose, which is to guide the jury in distinguishing "those who deserve capital punishment from those who do not." *Arave v. Creech*, 507 U.S. ____, 113 S. Ct. 1534, 1542 (1993).

A sentencing process that allows the jury to weigh aggravating factors based on the absence of mitigating factors creates both of the risks that *Stringer* recognized violate the Eighth Amendment. Because such a process creates aggravating factors that do not

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[59] *See, e.g., People v. Kaurish*, 52 Cal.3d at 717, 802 P.2d at 316 (trial judge concluded that factor (h) was aggravating because the defendant had the capacity to appreciate the criminality of his conduct and was not impaired by intoxication); *People v. Hamilton*, 48 Cal.3d at 1186, 774 P.2d at 757 (trial court concluded that one factor, the absence of prior violent criminal activity, was mitigating, and that the remaining 10 factors, including factor (k), were aggravating); *People v. Brown*, 46 Cal.3d at 462, 758 P.2d at 1155.

rationally make the defendant more deserving of death, it "creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance." *Stringer v. Black*, 503 U.S. ____, 112 S. Ct. 1130, 1139 (1992). Because such a process artificially inflates the number of aggravating factors the jury weighs, it "creates the possibility not only of randomness but of bias in favor of death." Id.[60]

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[60] The jury's consideration of the *absence* of "extreme" mental or emotional disturbance, "extreme" duress or the "substantial" domination of another person (Cal. Penal Code §§ 190.3(d) and (g) (Deering 1994)) as an aggravating factor is unacceptable under the Eighth Amendment for an additional reason. The text of these factors requires the jury to make an inherently amorphous determination regarding the degree of disturbance and domination. Aggravating factors that include terms like "extreme" and "substantial" do not provide sufficient guidance to avoid arbitrary and capricious sentencing. See, e.g., *State v. David*, 468 So.2d 1126, 1129-30 (La. 1984), *cert. denied*, 476 U.S. 1130 (1986) (holding vague an aggravating factor which allowed the jury to impose death based upon a "significant" history of criminal conduct); *State v. White*, 395 A.2d 1082 (Del. 1978) (holding vague an aggravating factor in which the victim was defined as "elderly" or "defenseless"); *Arnold v. State*, 224 S.E.2d 386, 391-92 (Ga. 1976) (holding vague an aggravating factor which allowed the jury to impose death based upon a "substantial" history of assaultive convictions).

CONCLUSION

For the foregoing reasons, the judgments of the California Supreme Court affirming petitioners' death sentences should be reversed.

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Respectfully submitted,

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OCTOBER TERM, 1993

PAUL PALALAUA TUILAEPA, *Petitioner*,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, *Respondent*,

---- AND ----

WILLIAM PROCTOR, *Petitioner*,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, *Respondent*.

On Writs of Certiorari to the Supreme Court of the State of California

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

In *California* v. *Ramos*, this Court made the following holding: "Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty . . . the jury is then free to consider a *myriad of factors* to determine whether death is the appropriate punishment."

The question presented is whether *Stringer* v. *Black* overruled this holding.

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit corporation formed to advance the interests of victims of crime and the law-abiding public in the criminal justice system. Defendants' efforts to overturn the use of aggravating factors that have been used for 17 years in California is contrary to the interests CJLF was formed to protect.

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1. All parties have consented in writing to the filing of this brief.

SUMMARY OF FACTS AND CASE

In April of 1982, defendant Proctor tortured, raped, and murdered Bonita Stendall, a 55-year-old, widowed first grade teacher. Proctor J. A. 96. At his second penalty trial the next year, the jury was instructed to base its verdict on whether the aggravating circumstances "outweigh" any mitigating. *Id.*, at 79. Included in the aggravating circumstances were the circumstances of the crime (to the extent they are aggravating), prior violent crimes, and prior conviction of felonies. *Id.*, at 77.

In October of 1986, defendant Tuilaepa entered a bar during Monday night football. He robbed the bartender, robbed the patrons, shot and killed patron Melvin Whiddon, and shot and wounded three other patrons. Tuilaepa fired the last shot while exiting the bar and smiled before shooting. Tuilaepa J. A. 69-71.

Because Tuilaepa's case was tried after *People* v. *Brown*, 40 Cal. 3d 512, 541, 709 P. 2d 440, 456 (1985), his jury received a different instruction from that given Proctor's jury. "In weighing the various circumstances, you simply determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances." Tuilaepa J. A. 63. The jury was instructed, as in *Proctor*, to consider circumstances of the crime, prior violent crimes, and prior felony convictions. *Id.*, at 60-61.

Both defendants were sentenced to death, and both sentences were upheld. *People* v. *Proctor*, 4 Cal. 4th 499, 842 P. 2d 1100 (1992); *People* v. *Tuilaepa*, 4 Cal. 4th 569, 842 P. 2d 1142 (1992).

SUMMARY OF ARGUMENT

This case should not be decided on the simplistic basis of whether California is or was a "weighing state." Instead, the California system and the manner in which it considers aggravating circumstances must be examined on an individual basis.

Over many years and many cases, this Court has repeatedly distinguished between the circumstances used to narrow the death-eligible class and those used to select the proper sentence for defendants within that class. The eligibility factors must provide clear and objective guidance. However, in *California* v. *Ramos* this Court held, while considering the very statute at issue here, that consideration of "a myriad of factors" in the final selection phase was not only permissible but desirable, and that a lack of concrete guidance "presents no constitutional problem."

The problem of racial prejudice provides no ground to strike down the California system. California's middle-of-the-road approach to aggravating circumstances is at least equal to, if not superior to, other approved approaches.

California's system has survived 17 years of the most intense litigation in history, including four reviews by this Court. To strike it down now "would be nothing less than a breach of faith."

ARGUMENT

In *Zant* v. *Stephens*, 462 U. S. 862, 878 (1983), this Court drew a sharp distinction between circumstances used to narrow the death-eligible class and those used "in the process of selecting, from among that class, those defendants who will actually be sentenced to death." While the specificity requirement of *Godfrey* v. *Georgia*, 446 U. S. 420 (1980) applies to the eligibility circumstances, "the Constitution does *not* require the jury to ignore other possible aggravating factors" in the selection step. *Stephens*, 462 U. S., at 878 (emphasis added).

In *California* v. *Ramos*, 463 U. S. 992, 1008 (1983), this Court emphatically repeated this distinction, quoted the *Stephens* principle, and applied it to the very statute at issue in the present case. Defendants' position that the *Godfrey* standard of specificity applies to California's selection circumstances cannot be reconciled with *Ramos*. Their position, then, boils down to a contention that *Stringer* v. *Black*, 117 L. Ed. 2d 367, 112 S. Ct. 1130 (1992) overruled *Ramos*, even while denying it was creating or applying any new rules. That cannot be correct.

I. The label "weighing state" is simplistic and should be abandoned.

A. The Tyranny of Labels.

"A fertile source of perversion in constitutional theory is the tyranny of labels." *Snyder* v. *Massachusetts*, 291 U. S. 97, 114 (1934). Justice Cardozo's wise admonition rings especially true in the present case.

In the past few years, this Court's opinions in this area have scrutinized the standard by which the sentencer makes the final decision, to determine whether the sentencer "weighs." See, *e.g.*, *Richmond* v. *Lewis*, 121 L. Ed. 2d 411, 421, 113 S. Ct. 528, 534-535 (1992). This distinction, *amicus* submits, is a mirage. The unvarnished truth is that *all* sentencers "weigh."

The *Richmond* Court, analyzing the standard used for the final sentencing decision in Arizona, said this. "Read most naturally, [the statute] requires the sentencer to weigh aggravating and mitigating circumstances—to determine the relative 'substan[ce]' of the two kinds of factors." *Id.*, 121 L. Ed. 2d, at 421, 113 S. Ct., at 535. That is quite true, but is it any less true of the instruction in *Zant* v. *Stephens*?

Stephens' jury was instructed that it "shall consider any mitigating circumstances or aggravating circumstances authorized by law."[2] How can jurors comply with this instruction without "weighing" the aggravating and mitigating against each other? Mitigating circumstances, by definition, are those proffered as a basis for a sentence less than death. See, *e.g.*, *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978) (plurality opinion). Aggravating circumstances are necessarily the opposite. A decision process which considers them both necessarily involves a consideration of their relative moral force, *i.e.* "weighing."

The *Stephens* Court implicitly recognizes that Georgia juries *do* "weigh." In the course of rejecting the argument that a vague eligibility factor had poisoned the sentencing decision, the *Stephens* Court says "That label [statutory aggravating circumstance] arguably might have caused the jury to give somewhat greater *weight* to respondent's prior criminal record than it

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2. The full instruction is reproduced in the Appendix.

otherwise would have given." *Zant* v. *Stephens*, *supra*, 462 U. S., at 888 (emphasis added); see also *id.*, at 880 (referring to Georgia jury's "weighing").

People v. *Brown*, 40 Cal. 3d 512, 541, 709 P. 2d 440, 456 (1985), rev'd on other grounds *sub nom. California* v. *Brown*, 479 U. S. 538 (1987), explained the nature of the decision process under California law.

> "[T]he word 'weighing' is a metaphor for a process which by nature is incapable of precise description. The word connotes a mental balancing process, but certainly not one which calls for a mere mechanical counting of factors on each side of the imaginary 'scale,' or the arbitrary assignment of 'weights' to any of them. . . . Thus the jury, by weighing the various factors, *simply determines under the relevant evidence which penalty is appropriate in the particular case.*" *Ibid.* (emphasis added).

Only by straining logic to the breaking point could one contend that there is a difference of constitutional magnitude between a direction to "weigh" aggravating and mitigating circumstances, as that term is used in *Brown*, and a direction to "consider" aggravating and mitigating circumstances such as the one in *Zant* v. *Stephens*. There are differences between the various states' sentencing systems, to be sure, but the difference does not lie in a distinction between "weigh" and "consider." So long as the sentencer has discretion and considers mitigating factors, which the Eighth Amendment has been construed to require, see *Sumner* v. *Shuman*, 483 U. S. 66, 73-76 (1987) (summarizing cases), *all sentencers "weigh."*

In the past, this Court has resisted the temptation to oversimplify and overclassify death penalty statutes. "We take statutes as we find them . . . . '[E]ach distinct system must be examined on an individual basis.' " *Pulley* v. *Harris*, 465 U. S. 37, 45 (1984), quoting *Gregg* v. *Georgia*, 428 U. S. 153, 195 (1976). It would be a fundamental error, *amicus* submits, to simply decide whether California is to be labelled a "weighing state" and then mechanically apply the standard of *Godfrey* v. *Georgia*, 446 U. S. 420 (1980) and *Maynard* v. *Cartwright*, 486 U. S. 356 (1988) to California's "aggravating" circumstances as a

result of that labelling. Instead, California's system must be "examined on an individual basis" to determine the proper rule.

B. Variation in Death Penalty Statutes.

There is considerable variation in state capital sentencing systems. They do not neatly fit into two pigeonholes labelled "weighing" and "nonweighing." To illustrate, we will look briefly at the four states with the largest numbers of capital cases: Texas, Georgia, Florida, and California.

The Texas system has a narrowed definition of capital murder. Aggravating and mitigating circumstances are considered indirectly as they relate to the statutory "special issues" of deliberation and future dangerousness. *Jurek* v. *Texas*, 428 U. S. 262, 272-273 (1976) (lead opinion). The future dangerousness inquiry is a broad one, sweeping in a wide variety of information about the defendant. *Ibid.* *Jurek* upheld the system against a vagueness attack on future dangerousness, *id.*, at 275-276, and this Court reaffirmed the validity of the broad inquiry in *Barefoot* v. *Estelle*, 463 U. S. 880, 896-897 (1983).

The Georgia system narrows the death-eligible class with statutory aggravating circumstances, one of which must be found true by the jury. From that point on, however, the jury is not limited to the statutory list and may consider *any* circumstances in aggravation or mitigation. *Zant* v. *Stephens*, *supra*, 462 U. S., at 871. However, the jury is explicitly instructed to consider the statutory aggravating circumstances, along with any others it deems relevant, in arriving at the final determination. See Appendix. The jury is told to "consider" aggravating and mitigating circumstances, but is not told to "weigh" them. *Ibid.*

Stephens and *Gregg* v. *Georgia*, 428 U. S. 153 (1976) held that the jury's consideration of unlimited aggravating circumstances at this final decision stage is not merely permissible, it is preferable. "We think the Georgia court *wisely* has chosen not to impose *unnecessary* restrictions . . . ." *Stephens*, *supra*, 462 U. S., at 886, quoting *Gregg* (emphasis added).

This expansion of aggravating factors *in* the final sentencing decision, beyond those considered for eligibility, was the basis of *Zant* v. *Stephens*. The fact that Stephens' jury should not have been instructed on his criminal record as an eligibility

circumstance did not render erroneous their consideration of that record in the final sentencing decision. 462 U. S., at 888.

In Florida, as in Georgia, the death-eligible class is narrowed by the requirement that at least one in a list of aggravating circumstances must be found true. *Barclay* v. *Florida*, 463 U. S. 939, 954 (1983) (plurality). Unlike Georgia, however, the prosecution's case for a sentence of death is limited to that *same* list of factors. *Ibid.* The jury is instructed to "weigh" the aggravating against any mitigating. *Id.*, at 953.

This structure creates a linkage between the eligibility findings and the final sentencing decision. A factor not found for eligibility does not belong on "death's side of the scale." See *Stringer* v. *Black*, 117 L. Ed. 2d 367, 379, 112 S. Ct. 1130, 1137 (1992) (discussing similar Mississippi system, see *post*, at 18). A factor erroneously found for eligibility is thus wrongly on "death's side of the scale." This is different from Georgia, where an eligibility factor which is erroneous only for vagueness is nonetheless properly considered in the last step.

Where multiple eligibility factors are found true, an error in only one is necessarily harmless error as to eligibility. However, in Florida-type systems, that same error may result in a factor being considered in the balance that should not have been there. That damage can be repaired only by a determination that the error was harmless or by a new "weighing." *Ibid.* When the *Stephens* Court noted that its holding would not necessarily apply in all states, it cited three states, all of which limit aggravation in the final selection stage to the same circumstances used for eligibility. See *Stephens*, *supra*, 462 U. S., at 873-874, n. 12, and statutes there cited.

All of this Court's recent opinions on vague "aggravating" circumstances have involved Florida-type systems. That is, the sentencer must explicitly find at least one circumstance in the statutory list true for the defendant to be *eligible* for the death penalty. Furthermore, in each case the aggravating side of the "weighing" process has been limited by state law to the eligibility circumstances found true. *Parker* v. *Dugger*, 498 U. S. 308 (1991) (Florida); *Stringer*, *supra*; *Sochor* v. *Florida*, 119 L. Ed. 2d 326, 112 S. Ct. 2114 (1992); *Espinoza* v. *Florida*, 120 L. Ed. 2d 854, 112 S. Ct. 2926 (1992); *Richmond* v. *Lewis*,

121 L. Ed. 2d 411, 113 S. Ct. 528 (1992) (Arizona); see *Walton* v. *Arizona*, 497 U. S. 639, 643-644 (1990) (describing Arizona system). In each of these cases, there was *Godfrey* error because an *eligibility* circumstance was vague. With the possible exception of *Stringer*, discussed further below, these cases dealt only with the question of when *Godfrey* error is harmless, and not with any independent specificity requirement in the selection stage.

Arave v. *Creech* 123 L. Ed. 2d 188, 113 S. Ct. 1534 (1993) did not deal with the selection stage at all, because Idaho chose to take its stand on the position that its factor was valid for eligibility under *Godfrey*. See *id.*, 123 L. Ed. 2d, at 197, 113 S. Ct., at 1540 (certiorari granted, limited to "narrow question"). Defendant Proctor's attempt to infer a holding from the presence of additional factors in *Creech*, Brief for Petitioner 15, is incorrect. Cases are not authority for propositions not considered. See *Webster* v. *Fall*, 266 U. S. 507, 511 (1925).

California's law has gone through three phases. There is the 1977 statute upheld in *Pulley* v. *Harris*, *supra*; the 1978 initiative as literally written, considered in *California* v. *Ramos*, 463 U. S. 992 (1983) and *Boyde* v. *California*, 494 U. S. 370 (1990); and the statute as judicially modified in *People* v. *Brown*, 40 Cal. 3d 512, 541, 709 P. 2d 440, 456 (1985), rev'd on other grounds *sub nom. California* v. *Brown*, 479 U. S. 538 (1987). See *Boyde*, 494 U. S., at 374-375, n. 3 (summarizing change made by *Brown*).

The 1977 law directed the jury to "take into account and be guided by the aggravating and mitigating circumstances," but did not use the word "weigh." See *Harris*, *supra*, 465 U. S., at 52. The 1978 statute, as written, requires the jury to "weigh" and to sentence the defendant to death if the aggravating outweighs the mitigating. Cal. Penal Code § 190.3; Proctor J. A. 79. However, to avoid the perceived constitutional problem ultimately dismissed in *Boyde*, the California Supreme Court construed this feature out of the statute in *Brown*, *supra*, 40 Cal. 3d, at 539-541, 709 P. 2d., at 454-456. Juries are now instructed to consider the circumstances and determine the appropriate penalty. California Jury Instructions, Criminal § 8.88 (5th ed., Supp. 1994); Tuilaepa J. A. 63.

Throughout this evolution, though, the California system has had a feature that makes it different from either the Georgia or Florida systems. There are two *different* lists of aggravating circumstances. For narrowing the death-eligible class, the jury must find a "special" circumstance. For the final sentencing decision, the jury may consider in aggravation not only the special circumstances previously found but also any circumstances of the offense deemed aggravating, any prior felonies, and any prior crimes of violence. Cal. Penal Code § 190.3(a), (b) and (c).[3] In other words, the only relevant items of aggravating evidence excluded are nonviolent misdemeanors and general, noncriminal "bad character" evidence. As in Georgia, this breadth of aggravating circumstances is not only permissible, it is preferable. See *California* v. *Ramos*, 463 U. S. 992, 1008 and n. 22 (1983).

In summary, then, California's system is not entirely like Georgia's, Florida's, or Texas's. Like Texas, and unlike Georgia and Florida, eligibility for capital punishment is determined by findings in the guilt phase and not in the penalty phase. Like Georgia, and unlike Florida, the penalty decision is open on the aggravating side to broad factors, and not limited to a few specific factors. However, like Florida and Texas, and unlike Georgia, the jury is not given a completely free rein to consider any factors it wants.

This variety in statutes defies simplistic pigeonholing as "weighing" or "nonweighing." It is time, *amicus* submits, to abandon the simplistic approach and return to the original wisdom of examining each system individually.

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3. The statute also lists "age" which, where it is applicable, is usually a mitigating factor. See, *e.g.*, *Johnson* v. *Texas*, 125 L. Ed. 2d 290, 311-312, 113 S. Ct. 2658, 2673 (1993) (O'Connor, J., dissenting). While it is possible for age to be aggravating, see *ibid.*; *People* v. *Sandoval*, 4 Cal. 4th 155, 189, 841 P. 2d 862, 880 (1992), cert. granted limited to other grounds *Sandoval* v. *California*, No. 92-9049 (Sept. 28, 1993), these cases do not present that issue. The prosecutor in *Proctor* explicitly told the jury that age was mitigating, Proctor J. A. 27-28, while the prosecutor in *Tuilaepa* merely argued that under the circumstances of the case age was not mitigating. Tuilaepa J. A. 11-14.

II. Broad aggravating circumstances are a highly desirable part of individualized sentencing.

Defendant Tuilaepa maintains that "In the years since *Godfrey*, the Court has never suggested that the approach used in *Godfrey* to evaluate the propriety of aggravating factors is somehow limited to schemes which, like Georgia, limit the use of aggravating factors to determining whether a defendant is eligible for the death penalty." Brief for Petitioner Tuilaepa 13. If counsel for Tuilaepa means this statement to imply that this Court has never limited *Godfrey* to eligibility circumstances, then he is quite wrong. This Court has recognized such a distinction repeatedly. One of these cases dealt with the very statute at issue in the present case.

A. California v. Ramos.

California v. *Ramos*, 463 U. S. 992 (1983) involved a paragraph of California Penal Code section 190.3 known as the "Briggs Instruction," which required that the jury be informed of the possibility of commutation of life-without-parole sentence. The California Supreme Court had held in its decision in *Ramos* that the instruction invites the jury "to *consider* the commutation power in its sentencing determination," and this Court proceeded with its analysis on that basis. *Id.*, at 998, n. 8 (emphasis in original). This Court then rejected Ramos's vagueness attack on the future dangerousness determination inherent in this consideration.

The *Ramos* Court's rejection of this attack was based in part on a comparison of California's system with the one approved in *Jurek* v. *Texas*, 428 U. S. 262 (1976). *Ramos*, *supra*, 463 U. S., at 1001-1002. In Texas, as in California, there is a clear separation between the death-eligibility criteria and the factors used for selection from the eligible class. *Id.*, at 1000, n. 11, 1002. The Texas offense of "capital murder" corresponds to the California verdict of murder in the first degree with special circumstances. Compare *Jurek*, *supra*, 428 U. S., at 268 with Cal. Penal Code §§ 189, 190.2.

If "future dangerousness" were subjected to the *Godfrey* test of specificity, it would surely fail. Just as virtually all murders are "vile," cf. *Godfrey* v. *Georgia*, 446 U. S. 420, 428-429

(1980) (plurality), so virtually all murderers are "dangerous." Vileness and dangerousness are both relative terms as applied to murders and murderers, respectively. When the jury makes one of these determinations, it is not finding a fact to be objectively true or false; it is placing the crime or the criminal on a continuum, relative to other crimes and criminals. In *Godfrey*, the lack of any objective milestones on this continuum was a constitutional defect, lacking any "principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." 446 U. S., at 433; see also *People* v. *Superior Court* (*Engert*), 31 Cal. 3d 797, 806, 647 P. 2d 76, 81 (1982). In *Jurek*, the lack of objective milestones on the continuum of dangerousness was not a defect, and the Court explicitly rejected the vagueness challenge. 428 U. S., at 274-276. The difference is that *Godfrey* involves an eligibility criterion and *Jurek* and *Ramos* do not.

Ramos does not end with the *Jurek* discussion, however. The *Ramos* Court goes on to discuss the nature of the sentencing decision, relying heavily and explicitly on *Zant* v. *Stephens*, 462 U. S. 862 (1983):

> "In returning a conviction, the jury must satisfy itself that the necessary elements of the particular crime have been proved beyond a reasonable doubt. In fixing a penalty, however, there is no similar 'central issue' from which the jury's attention may be diverted.[21] *Once the jury finds that the defendant* falls within the legislatively defined category of persons *eligible* for the death penalty, as did respondent's jury in determining the truth of the alleged special circumstance, *the jury then is free to consider a myriad of factors* to determine whether death is the appropriate punishment. In this sense, the jury's choice between life and death must be individualized. 'But *the Constitution does not require the jury to ignore other possible . . . factors* in the process of selecting . . . those defendants who will actually be sentenced to death.' *Zant* v. *Stephens*, 462 U.S. 862, 878 (1983) (footnote omitted). As we have noted, the essential effect of the Briggs Instruction is to inject into the sentencing calculus a consideration akin to the aggravating factor of future dangerousness in the Texas scheme. See *supra* at 1003. This element '*is simply one of the countless consider-*

ations weighed by the jury in seeking to judge the punishment appropriate to the individual defendant.' 462 U.S., at 900 (Rehnquist, J., concurring in the judgment).[22]

"[21] '[S]entencing decisions rest on a far-reaching inquiry into *countless facts and circumstances* and not on the type of proof of particular elements that returning a conviction does.' *Zant* v. *Stephens*, 462 U.S., at 902 (Rehnquist, J., concurring in judgment).

"[22] Consideration of the commutation power does not undermine the jury's statutory responsibility to weigh aggravating factors against mitigating factors and impose death only if the former outweigh the latter. *The desirability of the defendant's release into society is simply one matter that enters into the weighing process*. Moreover, the fact that the jury is given *no specific guidance* on how the commutation factor is to figure into its determination *presents no constitutional problem*. As we held in *Zant* v. *Stephens*, *supra*, the constitutional prohibition on arbitrary and capricious capital sentencing determinations is not violated by a capital sentencing 'scheme that permits the jury to exercise unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty by statute.' *Id.*, at 875." *Ramos*, *supra*, 463 U. S., at 1008 (emphasis added).

Thus, this Court has quite explicitly held that the sentence selection process of California Penal Code section 190.3 is *not* governed by the same strict specificity requirements as the death eligibility determination. Moreover, as footnote 22 makes clear, the *Ramos* Court did so while very much aware that section 190.3 as written and as then construed called for a "weighing" process and that the factor before the Court was "one matter that enters into the weighing process."

After *Ramos* and before *Stringer* v. *Black*, 117 L. Ed. 2d 367, 112 S. Ct. 1130 (1992), *amicus* would have considered this point so thoroughly established that it would only require a bare citation, not a major section of a brief. Regrettably, some language in the *Stringer* opinion has muddied the previously clear waters to the point that an unequivocal reassertion of the

Ramos principle is necessary. To show why *Ramos* was right, we go back to the beginning.

B. Narrowing: Necessary for Rationalization.

In *Furman* v. *Georgia*, 408 U. S. 238 (1972), this Court struck down the existing system of unfettered discretion in capital sentencing, effectively overruling the clear holding of *McGautha* v. *California*, 402 U. S. 183, 207 (1971). In sharp contrast to Justice Harlan's careful, thorough, scholarly opinion for a solid majority in *McGautha*, none of the five Justices voting to reverse in *Furman* joined any of the others' opinions. Cf. *Douglas* v. *Jeannette*, 319 U. S. 157, 182 (1943) (Jackson, J., concurring in the judgment) (duty to explain basis).

Notwithstanding this fracture, it is clear enough what motivated a majority of the Court to make the dramatic about-face that it did. Pre-*Furman* death penalty law provided far too much leeway for racial discrimination. See *Graham* v. *Collins*, 122 L. Ed. 2d 260, 277-280, 113 S. Ct. 892, 904-906 (1993) (Thomas, J., concurring); *id.*, 122 L. Ed. 2d, at 292, 113 S. Ct., at 915 (Stevens, J., dissenting).

The evil exposed in *Furman* was the result of two concurrent causes: the breadth of offenses for which death was an available punishment and the lack of guidance for selecting those actually sentenced to death from the eligible offenders. See *Walton* v. *Arizona*, 497 U. S. 639, 715 (1990) (Stevens, J., dissenting); *Gregg* v. *Georgia*, 428 U. S. 153, 206-207 (1976) (lead opinion). To address this problem, the post-*Furman* statutes all have some form of "narrowing" for the crime of murder, and this Court has several times referred to narrowing as a constitutional requirement. See *Zant* v. *Stephens*, 462 U. S. 862, 877 (1983); *Lowenfield* v. *Phelps*, 484 U. S. 231, 244 (1988).

For the most part, the identification of factors which separate the death-eligible defendants from the others is a matter for legislative and not judicial decision. See *Gregg*, *supra*, 428 U. S., at 192. The one major limitation on eligibility factors is tightly bound to the purpose of those factors. That is, "aggravating circumstances must be construed to permit the sentencer to make a principled distinction between those who deserve the death penalty and those who do not." *Lewis* v. *Jeffers*, 497

U. S. 764, 776 (1990). The *Jeffers* Court left no ambiguity concerning what it meant by "aggravating circumstances"—"those circumstances that make a criminal defendant '*eligible*' for the death penalty . . . ." *Id.*, at 774 (emphasis added); see also *Graham* v. *Collins*, 122 L. Ed. 2d 260, 300, 113 S. Ct. 892, 922 (1993) (Souter, J., dissenting) ("specific and detailed guidance" requirement is for eligibility); *Stephens*, *supra*, 462 U. S., at 886.

Because eligibility turns on a "yes or no" answer to a question, that question must be one which is susceptible to such an answer. Because all murders are heinous, asking a jury whether the murder is "especially heinous" fails to provide a principled distinction. See *Maynard* v. *Cartwright*, 486 U. S. 356, 364 (1988). For eligibility circumstances to work properly, the jury must be asked to find a fact true or false, and not simply to place the crime on an unmarked continuum of heinousness, with no clue as to where the line is drawn between "especially heinous" and "ordinarily heinous."

Narrowing the eligible class requires a factual determination, but the fact need not be externally visible or mathematically precise. The defendant's state of mind can be a valid eligibility circumstance, since state of mind is a factual determination, albeit a difficult one. *Arave* v. *Creech*, 123 L. Ed. 2d 188, 199, 113 S. Ct. 1534, 1541-1542 (1993).

C. Mitigation: Necessary for Individualization.

The most obvious answer to the *Furman* problem of arbitrariness and discrimination would appear to be mandatory sentencing. However, *Woodson* v. *North Carolina*, 428 U. S. 280 (1976) struck down mandatory sentencing. The *Woodson* plurality gave three reasons for this holding: collective legislative judgment, *id.*, at 298-299, the inevitable widespread nullification of a sweeping, mandatory death penalty for first-degree murder, *id.*, at 291-296, and a newly created constitutional imperative of individualized sentencing, *id.*, at 303-305.

The nullification point is far and away the strongest support for the *Woodson* rule. If the system has no formal outlet for the extension of mercy in appropriate cases, the operators of the system will find informal ways. This went on for centuries in

England, from the faking of reading tests for "benefit of clergy," see Maitland & Montague, A Sketch of English Legal History 72-73 (Colby ed. 1915), to bogus insanity verdicts, which dropped sharply upon the abolition of capital punishment, see J. Wilson, Thinking About Crime 187 (1976). Justice and equality are better served by keeping the inevitable mercy decision out in the open and permitting the state to structure it. *Woodson*, *supra*, 428 U. S., at 303.

The final choice between life imprisonment and death is fundamentally different from the eligibility determination. See *Ramos* quote, *ante*, at 11-12; *Sawyer* v. *Whitley*, 120 L. Ed. 2d 269, 282, 112 S. Ct. 2514, 2520-2521 (1992). While the Constitution requires the eligibility determination to be based on legislatively specified facts, the Constitution has been construed to require that the sentencer be permitted to consider "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978) (plurality opinion).

There are two possible justifications for the *Lockett* rule. One is a naked desire to reduce the number of death verdicts. It is self-evident that this reason is illegitimate, and if *Lockett* rested on this reason, *Lockett* would be illegitimate.

A second reason for the rule is a conviction that the complexities of human behavior preclude any attempt to list the factors that ought to inform the final sentencing decision. This is the rationale the *Lockett* plurality gives for its rule. Full information and a wide range of factors increase the accuracy of sentencing. *Id.*, at 602-603.

D. Aggravation: The Indispensable Flip Side.

If the final stage of capital sentencing is truly to be individualized, mitigating circumstances cannot be considered in a vacuum. Whether the factors proffered in mitigation *really do* "call for a less severe penalty," see *id.*, at 605, necessarily depends on the relevant factors in aggravation.

A hypothetical will illustrate. A and B are both convicted of rape and murder, a death-eligible offense. They are equally culpable of the crime. They both offer the same mitigation:

they were drunk. Both have criminal records, so neither can claim lack of a record as mitigation. A's record, however, is a single prior conviction of unarmed robbery, while B has committed numerous previous rapes, including exceptionally brutal and sadistic acts.

Prior conviction of a violent felony less than murder is generally not an eligibility circumstance. Indeed, in *Zant* v. *Stephens* the state court had previously stricken a similar circumstance as unconstitutionally vague. 462 U. S., at 867. Yet if their criminal records cannot be considered as aggravating, the sentencing profiles of A and B are badly skewed. They appear to be equally deserving of the death penalty, when in fact B is vastly more deserving.

For mitigating evidence to perform its accuracy-enhancing function, it must be presented and considered in the context of aggravating evidence. Mitigation without aggravation makes no more sense than peaks without valleys. Just as accuracy is enhanced by consideration of all relevant mitigating factors, so it is enhanced by consideration of all relevant aggravating factors.

Time and again, this Court has reiterated the legitimacy of broad aggravating circumstances in cases where the jury is instructed to "weigh." In *Ramos*, quoted *ante*, at 11-12, the factor of future dangerousness was upheld. *Payne* v. *Tennessee*, 115 L. Ed. 2d 720, 736, 111 S. Ct. 2597, 2609 (1991) permits consideration of the impact on the victim.

Both *Ramos* and *Payne* upheld, under statutes which instruct juries to "weigh," the consideration of aggravating factors which would fail the test of *Godfrey* v. *Georgia*, 446 U. S. 420 (1980) and *Maynard* v. *Cartwright*, 486 U. S. 356 (1988). These latter cases struck down the *eligibility* factors "outrageously or wantonly vile" and "especially heinous," because every murder is vile and heinous, and the additional adverbs provide no meaningful place to draw the line. See *Maynard*, 486 U. S., at 364.

By the same logic, "future dangerousness" would fail as an eligibility circumstance, because virtually all murderers will be dangerous, although some will be more so than others. See *ante*, at 10-11. In *Giarratano* v. *Procunier*, 891 F. 2d 483, 489-

490 (1989), for example, the Fourth Circuit rejected a vagueness attack on Virginia's use of "future dangerousness" only because the required narrowing had been done at an earlier stage of the proceedings. Yet *Ramos* expressly upheld future dangerousness as a "weighing" circumstance. See *ante*, at 12.

Victim impact would similarly fail *Godfrey*/*Maynard*. All murders have victims and virtually all victims leave survivors. See *Payne*, *supra*, 115 L. Ed. 2d, at 744, 111 S. Ct., at 2615 (Souter, J., concurring). The prosecutor in *Payne* argued that victim impact was relevant to the "especially heinous" factor in the sentencing phase, see *id.*, 115 L. Ed. 2d, at 729, 111 S. Ct., at 2603, but an eligibility finding under this circumstance based on victim impact alone would unquestionably be insufficient. Thus *Payne* upholds a "weighing" circumstance which is broader and more diffuse than would be allowed for an eligibility circumstance.

In *Barclay* v. *Florida*, 463 U. S. 939, 946 (1983), the trial judge considered Barclay's criminal record as an aggravating circumstance, even though Florida law does not permit this. Part II B of the plurality opinion addresses the question of whether Florida law could constitutionally have permitted his criminal record to be considered. It holds simply that the principle of broad aggravating circumstances set forth in *Zant* v. *Stephens* applies equally to Florida. *Barclay*, 463 U. S., at 956.[4] "Criminal record" is a valid sentencing criterion, even though it is too vague to be a valid eligibility circumstance. Cf. *Stephens*, 462 U. S., at 867-868. The *Barclay* concurrence, by the author of *Stephens*, is in complete accord on this point. *Barclay*, 463 U. S., at 966-967, 969-970 (Stevens, J., concurring in the judgment).

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4. The "harmless error" portion of *Barclay* noted in *Stringer* v. *Black*, 117 L. Ed. 2d 367, 379, 112 S. Ct. 1130, 1137 (1992), which is part II C of the *Barclay* opinion, refers only to the claim that the state court was "lawless" in its application of harmless error analysis to the *state law* error. See *Barclay*, 463 U. S., at 957-958. On the federal level, there simply was no error. The *Stringer* majority opinion glosses over this vitally important distinction. The dissent recognizes it. *Stringer*, 117 L. Ed. 2d, at 389, 112 S. Ct., at 1144-1145 (opinion of Souter, J.).

As of 1991, then, the law was settled beyond question. Once the eligibility hurdle is cleared, the Constitution does not limit sentencers to consideration of aggravating factors which meet the specificity requirement of *Godfrey/Maynard*. This principle applies to all state systems, whether they instruct juries to "weigh," as in *Ramos*, *Payne*, and *Barclay*, or whether they do not, as in *Zant* v. *Stephens*.

E. Reconciling Stringer with Ramos.

The single flaw in this otherwise clear crystal is a single, citeless sentence in *Stringer* v. *Black*, 117 L. Ed. 2d 367, 382, 112 S. Ct. 1130, 1139 (1992): "A vague aggravating factor used in the weighing process is in a sense worse [than a vague eligibility factor], for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance."

The main issue in *Stringer* was whether Mississippi's "aggravating" circumstances are subject to the specificity requirement of *Godfrey*. The circumstances function the same way as Florida's, *i.e.*, at least one must be found true, and those found true are the only ones "weighed" in aggravation. *Id.*, 117 L. Ed. 2d, at 378, 112 S. Ct., at 1136. The state argued that *Godfrey* did not apply because the required "narrowing" had been done in the guilt phase. This Court rejected that argument on the basis of Mississippi Supreme Court precedent. *Id.*, 117 L. Ed. 2d, at 380-381, 112 S. Ct., at 1137-1139.

Godfrey thus applies to the factors a state uses to establish the last "plane" dividing death-eligible from death-ineligible cases, cf. *Stephens*, *supra*, 462 U. S., at 871, regardless of whether earlier divisions would be constitutionally sufficient. This holding was sufficient to resolve the case before the Court, and the *Stringer* opinion could have stopped there. However, *Stringer* goes on to make the statement quoted above.

If the quoted sentence would overrule the "myriad of factors" holding of *Ramos*, see *ante*, at 11-12, then *Stringer* improperly created a new rule on habeas corpus and should, to that extent, be disapproved. See *Butler* v. *McKellar*, 494 U. S. 407, 412 (1990) (overruling precedent is "new rule"). If it does not, then it must be reconciled with *Ramos*.

Stringer and *Ramos* cannot be distinguished on the ground that "future dangerousness" is somehow less vague than "especially heinous." As noted earlier, both factors ask the sentencer to place the crime or criminal on a continuum without objective markings. Furthermore, *Ramos*'s "myriad of factors" discussion and extensive reliance on *Zant* v. *Stephens* preclude any distinction on this basis.

The two cases also cannot be distinguished on the ground of "weighing" versus "nonweighing." At the time *Ramos* was decided, the California system was *more* of a strict "weighing" process than the Mississippi system. Mississippi juries are told to further consider whether the aggravating circumstances are insufficient to warrant death despite their outweighing the mitigating, *Coleman* v. *State*, 378 So. 2d 640, 646-647 (Miss. 1979), while California juries at the time of *Ramos* were given no such instruction, see *Boyde* v. *California*, 494 U. S. 370, 373, n. 1 (1990) (quoting pre-1986 instruction).

The only distinctions which make a difference, then, are the breadth of factors considered on the aggravating side of the scale and the manner in which those factors are screened. In Mississippi, a statutory list is presented to the jury for unanimous findings of true or false. Only those "found to exist" are permitted to be considered. Miss. Code Ann. § 99-19-101(2)(c) (Supp. 1993). In California, the jurors generally make no findings on the second-stage factors,[5] and they need not agree on them. *People* v. *Cox*, 53 Cal. 3d 618, 692, 809 P. 2d 351, 395 (1991). Indeed, the factor of "circumstances of the crime," see Cal. Penal Code § 190.3(a), is not susceptible to a true or false answer.

This distinction is reinforced by *Stringer*'s description of the evil it sought to avoid: "the risk that the jury will treat the

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5. There is an exception to this general rule for prior crimes. For the benefit of the defendants, each juror must find beyond a reasonable doubt that the defendant committed the prior crime before that juror may consider it. California Jury Instructions, Criminal § 8.87 (5th ed., Supp. 1994).

defendant as more deserving of the death penalty than he might otherwise be by relying on the *existence* of an *illusory* circumstance." *Stringer*, *supra*, 117 L. Ed. 2d, at 382, 112 S. Ct., at 1139 (emphasis added). This creates a possibility of "randomness." *Ibid*. Why is this a risk in Mississippi and not in Georgia or California?

Suppose two defendants, C and D, are tried for similar murders. Both crimes are heinous. In Mississippi, both juries are asked to decide, yes or no, whether the crimes are "especially heinous." With no further guidance, C's jury may say yes and D's may say no, based on differences in the jurors' sensitivity rather than an actual difference in the crimes. The circumstance was "found to exist" in C's case but not D's. C's jury would therefore include heinousness on "death's side of the scale," and D's would be instructed not to. This is "randomness," causing C to be considered "more deserving of the death penalty" than D, for no valid reason.

In Georgia and California, this randomness is absent. Both juries will consider the heinousness of the crime. In Georgia, they do so because the final phase is open to all aggravating circumstances. In California, they do so because heinousness is a "circumstance of the offense." All murders are heinous, and the *degree* of heinousness is a proper consideration among the "myriad of factors" permitted under *Ramos*. There is no illusory circumstance. There is no randomness. Both juries give "weight" to the heinousness in the proportion they believe it deserves.

The difference is "the different role played by aggravating factors." *Stringer*, 117 L. Ed. 2d, at 380, 112 S. Ct., at 1137. In Florida and Mississippi the finding of truth of the eligibility factors is the exclusive gateway to the prosecution's case for penalty, while in Georgia and California the eligibility factors do not play this role.

The *Ramos* principle is as sound today as it was the day *Ramos* was decided. The sentencer is not constitutionally limited to considering those factors which meet the *Godfrey* test of specificity. The sentencer may consider "a myriad of factors," and this is true regardless of whether the sentencer "weighs."

III. California's system is less prone to discrimination than others previously upheld.

Amici supporting the defendants assert vigorously that minimizing the influence of racial prejudice has been an essential component of this Court's death penalty jurisprudence. See Brief for American Civil Liberties Union, et al. as *Amici Curiae* ("ACLU Brief") 11-15. With this statement *amicus* CJLF wholeheartedly agrees. Far from being a reason to accept defendants' position, however, this is a reason to reject it.

The simplest way to "fix" California's system, if this Court should declare it "broken," would be to adopt the Georgia system. Instead of limiting aggravating circumstances to the statutory list, California could open up the penalty phase to any and all aggravating circumstances the jury wishes to consider, and then instruct the jurors to "consider" rather than "weigh."

In *Zant* v. *Stephens*, 462 U. S. 862, 875 (1983), this Court unequivocally rejected the argument that "the mandate of *Furman* is violated by a scheme that permits the jury unbridled discretion" once the eligibility finding has been made. This holding was based in part on Georgia's appellate review procedures. *Id*., at 890. However, the next term the Court made clear that this holding referred only to meaningful appellate review, not necessarily intercase proportionality review. California's system of automatic reconsideration by the trial judge followed by automatic appeal to the state supreme court fulfills this requirement. *Pulley* v. *Harris*, 465 U. S. 37, 52-53 (1984); *id*., at 58-59 (Stevens, J., concurring in part).[6] The question, then, is whether California's minimal structuring of the final sentencing decision is likely to promote racial discrimina-

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6. The death-eligibility determination in California is different from Georgia, but the difference is not of constitutional magnitude. California's "special" circumstances are broader than Georgia's "aggravating" circumstances, but California divides murder into degrees while Georgia does not. Compare Cal. Penal Code §§ 189, 190.2 with *Stephens*, *supra*, 462 U. S., at 871. The division of murder into degrees, by itself, renders half of all California murderers exempt from capital punishment. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Tennessee* v. *Middlebrooks*, No. 92-989, at 21.

tion, when considered *relative to* the completely unbridled discretion approved in Georgia.

In answering this question, one must consider not only the Scylla of excessive discretion but also the Charybdis of excessive rigidity. If equality of application were the only criterion for constitutionality of a capital sentencing system, then mandatory sentencing would, at first blush, seem to be the solution. Indeed, in the wake of *Furman* v. *Georgia*, 408 U. S. 238 (1972), California enacted such a statute in the well-founded belief that *Furman* required mandatory sentencing. See *Rockwell* v. *Superior Court*, 18 Cal. 3d 420, 446-448, 556 P. 2d 1101, 1116 (1976) (Clark, J., concurring).

As noted *ante*, at 14, *Woodson* v. *North Carolina*, 428 U. S. 280 (1976) rejected mandatory sentencing, partly because it collided with another constitutional principle, but also because a sweeping, mandatory death sentence for all first-degree murderers would not be enforced as written, and would thus be uneven in practice. *Id.*, at 303. A sentencing mandate which is strongly at odds with a basic societal consensus regarding what sentence is appropriate raises the danger of sporadic nullification. This danger, in turn, raises the danger of racial inequality, because people may be less willing to violate their instructions for a defendant or a victim of a different race. See *Graham* v. *Collins*, 122 L. Ed. 2d 260, 293, 113 S. Ct. 892, 917 (1993) (Stevens, J., dissenting).

Thus, a statute that precludes consideration of a factor uniformly considered strongly mitigating may discriminate against minority defendants, as majority defendants are more likely to receive the benefit of jury nullification of the statute. Conversely, a statute that precludes consideration of a factor uniformly regarded as strongly aggravating may result in a denial of equal justice to minority victims, since jurors may be less motivated to disobey instructions to achieve justice for such a victim. Regardless of whether this latter type of inequality is a ground for attacking a state's sentencing system, see generally *McCleskey* v. *Kemp*, 481 U. S. 279 (1987), the state certainly has a powerful and wholly legitimate interest in avoiding such inequality.

The competing concerns are best resolved by expressly granting the jury discretion and by directing the jurors to exercise that discretion on the basis of those factors that society as a whole believes to be most pertinent to the decision, both on the aggravating side and the mitigating side.

On the mitigating side, this Court has gone far beyond societal consensus and insisted that the defendant be permitted consideration of any factor he proffers as mitigating. *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978) (plurality). As this Court is very much aware, defense lawyers have seized upon the *Lockett* rule to proffer some truly amazing evidence as "mitigating."

> "Every month, defendants who claim a special victimization file with this Court petitions for certiorari that ask us to declare that some new class of evidence has mitigating relevance 'beyond the scope' of the State's sentencing criteria. It may be evidence of voluntary intoxication or of drug use. Or even—astonishingly—evidence that the defendant suffers from chronic 'antisocial personality disorder'—that is, that he is a sociopath. See Pet. for Cert. in *Demouchette* v. *Collins*, O. T. 1992, No. 92-5914, p. 4, cert. denied, 505 U. S. ___ (1992)." *Graham* v. *Collins*, 122 L. Ed. 2d 260, 291, 113 S. Ct. 892, 915 (1993) (Thomas, J., concurring).

One *amicus* in the present case criticizes the variety of arguments prosecutors have made on aggravating circumstances. See Brief for California Appellate Project as *Amicus Curiae* 14-15. These examples pale in comparison to what the defense has done with *Lockett*. However, *Lockett* is now firmly entrenched as precedent, and the question is what breadth will be permitted on the other side.

The boundaries here would seem to be well marked. This Court has permitted both of the extreme positions. It is constitutional to base the final decision on only those narrowly defined aggravating factors used to define the death-eligible class, see *Proffitt* v. *Florida*, 428 U. S. 242, 248 (1976), despite the skewed sentencing profile that may result, see *ante*, at 15-16. Conversely, it is constitutional to give the jury free rein to define its own aggravating circumstances, *Zant* v. *Stephens*, *supra*, 462 U. S., at 875, subject only to the limitation that factors which are

impermissible for reasons other than breadth or vagueness may not be used, see, *e.g.*, *Dawson* v. *Delaware*, 117 L. Ed. 2d 309, 318, 112 S. Ct. 1093, 1098 (1992) (First Amendment violation).

While these other systems are within the broad limits of constitutionality, *amicus* submits that the California system, which takes the middle ground between them, is superior to either. California directs the jury's attention precisely where it ought to be.

"What is important at the selection stage is an *individualized* determination on the basis of the character of the individual *and the circumstances of the crime*." *Zant* v. *Stephens*, *supra*, 462 U. S., at 879 (second emphasis added). Without mentioning this unequivocal holding, though they cite the case elsewhere, *amici* ACLU, et al. denounce the California statute for telling the jurors to consider precisely what this Court has said they must consider. See ACLU Brief 15-23.

The other factor deemed important by *Stephens* is the "character of the individual." Although important for individualization, this factor has greater potential for discriminatory application, since it necessarily involves an inquiry into the defendant's entire life, as opposed to the circumstances of a single incident.

For the benefit of the defendant, California places substantial restrictions on bad-character aggravation. Character aggravation is limited to prior forcible or violent crimes and prior felony convictions. Cal. Penal Code § 190.3(b) and (c). This limitation excludes all nonviolent misdemeanors and all felonies for which the defendant was not prosecuted. All crimes of any kind for which the defendant was prosecuted and acquitted are excluded. *Id.*, para. 3; cf. *United States* v. *Boney*, 977 F. 2d 624, 635 (CA DC 1992). Bad character evidence is thus trimmed down, for the benefit of the defendant, to the most pertinent and most reliable kinds of evidence: prior violent crimes because they are most pertinent, and prior felony convictions because they are both pertinent and reliable.[7]

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7. The state can, of course, offer broader "bad character" evidence in rebuttal if defendant chooses to open the door with general "good character" evidence. See *Dawson*, *supra*, 117 L. Ed. 2d, at 318-319, 112 S. Ct., at 1098-1099; cf. Fed. Rule Evid. 404(a)(1).

By trimming down the aggravating circumstances, but not attempting a specific, *Godfrey*-qualified enumeration, California directs the jury to the essential factors of circumstances of the offense and character of the defendant. It avoids both the enormous breadth of Georgia's unlimited aggravation and the artificial skewing of Florida's limitation to eligibility factors.

Amici ACLU, et al. contend that "allowing California capital jurors to weigh any and all 'circumstances of the crime' they subjectively find to be aggravating without limitation or guidance results in those jurors exercising the unlimited discretion condemned in *Furman*." ACLU Brief 18. But "circumstances *of the crime*" is substantially greater guidance than is given in the approved Georgia system. It focuses the jury on the crime and not on a generalized disapproval of the defendant, his lifestyle, or the people he has associated with.

The ACLU cites no empirical evidence for the proposition that California's system is more prone to racial discrimination than the Georgia or Florida systems. CJLF has located only one published study on the penalty phase of California capital sentencing, and it points in the opposite direction.

Stephen Klein and John Rolph of the Rand Corporation analyzed the case characteristics of 496 death-eligible homicides. Using a computer "classification tree" program, they identified the factors that actually make a difference, in a statistically significant manner, in the sentencing decision. Klein & Rolph, Relationship of Offender and Victim Race to Death Penalty Sentences in California, 32 Jurimetrics J. 33, 39-41 (1991). Adding race to the mix, either the defendant's or the victim's, did not improve the predictability to any significant degree. *Id.*, at 43.

> "There was no evidence in our California database to indicate that the death penalty is imposed in an arbitrary or racially discriminatory manner. Receiving this penalty in our sample was moderately predictable due to its relationship to a combination of offender, victim, and crime characteristics. After accounting for some of the many factors that may influence penalty decisions, neither race of defendant nor

> race of victim appreciably improved prediction of who was sentenced to death and who received [life without possibility of parole]. In short, the empirical evidence is consistent with the principle that race of victim should not play a role in sentencing decisions." *Id.*, at 44.

This study has been published, and thus subject to peer review, for over three years. See *Daubert* v. *Merrell Dow Pharmaceuticals*, 125 L. Ed. 2d 469, 483, 113 S. Ct. 2786, 2797 (1993) (importance of publication and peer review). After checking the citation indices available at the date of this writing, *amicus* CJLF has found no published criticisms of the study, a remarkable silence for an article whose conclusion is anathema to the political orthodoxy of academia.

There is no perfect system for deciding which defendants will pay the full price for their crime and which will be granted mercy. *Lockett*, *supra*, 438 U. S., at 605. But neither Georgia's wide-open aggravation rule nor Florida's artificially limited list is an improvement over California's moderate approach. Neither is likely to do a better job of minimizing the impact of racial prejudice. The California compromise is constitutional.

IV. Striking down California's law now would contribute to the very evil *Furman* was intended to correct.

At some point, the constitutionality of a state's basic capital sentencing structure should be finally settled. The list of circumstances under attack here has been the law of California for 17 years. See *Pulley* v. *Harris*, 465 U. S. 37, 52, n. 14 (1984) (quoting 1977 statute).[8] California's system has been to this Court for review four times during those years, *Harris*, *supra*; *California* v. *Ramos*, 463 U. S. 992 (1983); *California* v. *Brown*, 479 U. S. 538 (1987); *Boyde* v. *California*, 494 U. S. 370 (1990), and been upheld every time. Enough is enough.

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8. The only factor added by the 1978 initiative was the crystal clear factor of prior conviction of a felony. Compare *ibid.* with Cal. Penal Code § 190.3(c).

The time for "discovering" fundamental defects not previously seen is long since past.

The course of this Court's capital sentencing jurisprudence has not been smooth for either supporters or opponents of capital punishment. Each side can point to decisions it believes are deeply, fundamentally wrong.

Yet the states which have capital punishment have accommodated the twists and turns, however much they may disagree with them. In the wake of *Woodson*, mandatory sentencing laws were repealed, even for life inmates otherwise exempt from any judicial punishment. See *Sumner* v. *Shuman*, 483 U. S. 66, 72, n. 2 (1987). The *Lockett* rule was accommodated by strained constructions of statutes. See *Songer* v. *State*, 365 So. 2d 696, 700 (Fla. 1978) (*per curiam*); *People* v. *Brown*, *supra*, 40 Cal. 3d, at 541, 709 P. 2d, at 456. The Texas Legislature acted promptly to accommodate *Penry* v. *Lynaugh*'s disapproval of its previously approved system. See *Graham* v. *Collins*, 122 L. Ed. 2d 260, 288, n. 9, 113 S. Ct. 892, 913, n. 9 (1993) (Thomas, J., concurring).

However, California has not acted to strip the jury of its authorization to "consider a myriad of factors to determine whether death is the appropriate punishment" for a defendant previously determined to be in the eligible class. See *Ramos*, *supra*, 463 U. S., at 1008. It did not for the clear and simple reason that this Court declared unequivocally that this practice "presents no constitutional problem." *Id.*, at 1008, n. 22.

Hundreds of capital cases have been tried and appealed since then. See U. S. Bureau of Justice Statistics, Capital Punishment 1991, p. 15. The cost has been enormous, not only in dollars but in the anxiety of the victims' families waiting for the creaking judicial machine to finally deliver justice.

To rule for the defendants in this case, this Court would have to either overrule *Ramos* outright or give it such a cramped and narrow interpretation as to raise grave doubt whether anyone can rely on this Court's precedents. An evasion of the plain meaning of the "myriad of factors" holding of *Ramos* would mean "that regard for precedents and authorities is obsolete, that words no longer mean what they have always meant to the profession, that

the law knows no fixed principles." See *Brown* v. *Allen*, 344 U. S. 443, 535 (1953) (Jackson, J., concurring in the judgment).

There is no ground for overruling *Ramos*. No new insights have rendered it obsolete. The rule is not "unworkable"; it is not "a remnant of abandoned doctrine"; no facts have changed. See *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 120 L. Ed. 2d 674, 700, 112 S. Ct. 2791, 2808-2809 (1992) (lead opinion). The rule most definitely is, however, "subject to a kind of reliance that would lend a special hardship to the consequences of overruling . . . ." *Ibid.*, 112 S. Ct., at 2808.

An "annually improvised" jurisprudence in the area of capital sentencing procedure is intolerable. See *Morgan* v. *Illinois*, 119 L. Ed. 2d 492, 517, 112 S. Ct. 2222, 2242 (1992) (Scalia, J., dissenting). In such an environment, the only defendants executed would be those the state could push through the system in the "window" period between one revision and the next. Chosen by timing as much as by culpability, they would be "a capriciously selected random handful." See *Furman* v. *Georgia*, 408 U. S. 238, 309-310 (1972) (opinion of Stewart, J.)

If executions are to be consistent and not capricious, if this Court is not to cause the very evil it set out to cure, states must be able to rely on a stable body of law. Approval of a practice must neither be rescinded at whim nor construed so narrowly as to render it meaningless.

To rule for the state in this case does require either narrow interpretation or partial disapproval of some surplus language in *Stringer* v. *Black*, 117 L. Ed. 2d 367, 112 S. Ct. 1130 (1992). The *stare decisis* concerns there, however, are quite different. First, there is no reliance interest whatever. No competent lawyer would try a death penalty case in reliance on an expectation that the statute will be struck down. Second, as a "new and unexpected decision,"[9] *Stringer* has not "become 'part of the tissue of the law.' " See *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 124 L. Ed. 2d 472, 516, 113 S. Ct. 2217, 2248 (1993) (Souter, J., concurring in part). Third, *Stringer*'s second,

9. Even a pro-defense commentator who applauds the result refers to *Stringer* as a "shocker." Metzner, Anatomy of an Upset: The Supreme Court's Shocker on Habeas Retroactivity, 28 Crim. L. Bull. 521 (1992).

alternative holding is the only one at issue here, see *ante*, at 18, and its "vitality as precedent is limited further by the seeming want of any need of it in resolving the question presented in the case." *Ibid.*, 113 S. Ct., at 2247.

If *Stringer* cannot be limited so as to preserve *Ramos* intact, then it "presents not the usual question of whether to follow a constitutional rule, but the question of which constitutional rule to follow . . . ." *Id.*, 124 L. Ed. 2d, at 517, 113 S. Ct., at 2248.

> "We recognize that *stare decisis* embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations. But *stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." *Helvering* v. *Hallock*, 309 U. S. 106, 119 (1940).

Ramos is that prior doctrine. In part II E, *ante*, at 18-20, *amicus* has suggested a way to reconcile *Stringer* with *Ramos* and with California's sentencing system. However, should this Court decide the cases cannot be reconciled, *Stringer* should be disapproved to the extent it is inconsistent with *Ramos*.

CONCLUSION

The judgment of the California Supreme Court should be affirmed.

February, 1994

Respectfully submitted,

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APPENDIX

Zant v. *Stephens*, 456 U. S. 410, 412, n. 1 (1982):

Gentlemen of the Jury, the defendant in this case has been found guilty at your hands of the offense of Murder, and it is your duty to make certain determinations with respect to the penalty to be imposed as punishment for that offense. Now in arriving at your determinations in this regard you are authorized to consider all of the evidence received in court throughout the trial before you. *You are further authorized to consider all facts and circumstances presented in extinuation [sic], mitigation and aggravation of punishment* as well as such arguments as have been presented for the State and for the Defense. Under the law of this State every person guilty of Murder shall be punished by death or by imprisonment for life, the sentence to be fixed by the jury trying the case. In all cases of Murder for which the death penalty may be authorized *the jury shall consider any mitigating circumstances or aggravating circumstances authorized by law. You may consider any of the following statutory aggravating circumstances* which you find are supported by the evidence. One, the offense of Murder was committed by a person with a prior record of conviction for a Capital felony, or the offense of Murder was committed by a person who has a substantial history of serious assaultive criminal convictions. Two, the offense of Murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim. Three, the offense of Murder was committed by a person who has escaped from the lawful custody of a peace officer or place of lawful confinement. These possible statutory circumstances are stated in writing and will be out with you during your deliberations on the sentencing phase of this case. They are in writing here, and I shall send this out with you. If the jury verdict on sentencing fixes punishment at death by electrocution you shall designate in writing, signed by the foreman, the aggravating circumstances or circumstance which you found to have been proven beyond a reasonable doubt. Unless one or more of these statutory aggravating circumstances are proven beyond a reasonable doubt you will not be authorized to fix punishment at death. If you fix punishment

at death by electrocution you would recite in the exact words which I have given you the one or more circumstances you found to be proven beyond a reasonable doubt. You would so state in your verdict, and after reciting this you would state, We fix punishment at death. On the other hand, if you recommend mercy for the defendant this will result in imprisonment for life of the defendant. In such case it would not be necessary for you to recite any mitigating or aggravating circumstances as you may find, and you would simply state in your verdict, We fix punishment at life in prison. Now, whatever your verdict may be with respect to the responsibility you have regarding sentencing please write these out, Mr. Foreman, immediately below the previous verdict you have rendered. Be sure that it is dated and that it bears your signature as foreman. Once again when you have arrived at your verdict on the sentencing phase of the case let us know. We will then receive the verdict from you and have it published here in open court. Please retire now and consider the sentence in this case.